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Feb 20

28

REPORTS

OR

Cases Argued and Determined

IN

OHIO COURTS OF RECORD

EXCEPT SUPREME AND CIRCUIT.

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REPORTS

OF

Cases Argued and Determined

IN THE

Superior and Common Pleas Courts

PARENT AND CHILD — GUARDIANS.

[Cuyahoga Probate Court.]

IN RE MINORS OF CHARLES AND ANNA LUCK.

1. AGREEMENT AS TO RELIGIOUS TRAINING OF CHILDREN.

An agreement entered into by a non-Catholic at the time of his marriage with a Roman Catholic, that the children born of such marriage shall be brought up in the Roman Catholic faith, or a similar agreement in respect to any religious denomination, in a controversy between the father and mother as to custody and education of such children, creates an estoppel of the father's right to direct the course of religious training so provided for, and he cannot be heard to say that the well-being of the children demands the violation of such agreement.

2. SUCH ESTOPPEL NOT ALLOWED IN CONTROVERSY BETWEEN RELATIVES.

But after such agreement has been annulled or disregarded by the father as surviving parent, having custody of the children, and for years, since the death of the mother, the nurture of the children has been away from such training, no such estoppel, upon the death of the father and in a contest between relatives of the father and mother, can be allowed to prevail over conditions which may materially affect the welfare of the children.

3. RULES APPLIED.

Under circumstances above stated, where it appears that the mother's relatives seeking guardianship of children of the ages (at date of application) of six and seven years, made no application therefor until more than four years after the mother's death, and that the children have grown into the affections of the father's relatives, with whom they have been allowed to remain, and no preponderating circumstances appear establishing that the best interests of the children will be subserved by a change, they should be allowed to remain with the father's relatives although under such guardianship their religious training will be in violation of the marriage agreement above referred to.

APPLICATION for appointment of a guardian.

1 Vol. 10 S. & C. P.

Cuyahoga Probate Court.

WHITE, J.

On September 6, 1899, Philo M. Klink made application in this court to be appointed guardian of William Leroy Luck, seven years of age January, 1899, and Lily Luck, six years of age November, 1898, the orphan children of Charles and Anna Luck both deceased. On September 12, 1899, Mary Luck, present widow of Charles Luck, made a like application for guardianship, which application was afterwards withdrawn by the applicant. On September 19, 1899, Daniel Scanlon made application for the guardianship of the same minors. The two applications, after due notice, came on to be heard jointly, and have been fully heard before the court upon testimony offered by both parties and arguments of counsel.

The cases presented on these applications, and upon the evidence, and in view of the unusual facts and circumstances, are of great interest and are not easily determined. There are no duties which the probate judge is called upon to exercise of a more important, delicate, and anxious nature, than that of appointing guardians for minor children.

There are several causes which concur in making such cases of grave and serious importance. The destiny and future usefulness and prosperity of a child, possessed of infinite possibilities, is to be affected in no small degree by the judgment of the court.

Another element which makes such cases oft-times delicate and difficult, is the fact that the strongest affections and feelings of love are excited in those interested in the guardianship. The ties of consanguinity are decided factors in the situation. The action of parties is sometimes based upon the blind and unreasoning impulses of affection, an attachment which is wholly laudable in itself, but never benefits the calm and dispassionate temper and spirit in which the court must fully consider and determine the case.

All these elements and circumstances in a very great degree, enter into this case. These children, William Leroy, and Lily, are double orphans, and are of tender years, and their choice as to their future custody cannot greatly aid the court in coming to a correct conclusion. They are, however, very fortunate in having relatives by blood upon both sides of the line, who are desirous of assuming the responsibility and care of their nurture, support and education. Not all orphans are so fortunate as these in this respect.

In all ordinary cases for the establishment of the guardianship of the person of a minor child, the policy of the law has been well settled. This policy requires the court to make the present and future well-being of the minor, the paramount and controlling consideration in the case. The law books are full of judicial authority and admonition upon this point.

The right of custody by nature or nurture vested in any person is not, of course, to be ignored, but the right even of the parent must

In re Minors of Charles and Anna Luck.

yield, in the proper case, to this dominant and paramount duty of the court to keep ever in view what constitutes under all circumstances, the best interests of the infant. But what is meant by the best interests of the child? Certainly the expression does not confine itself to its material and physical well-being alone. The court performing the responsible duty of establishing custody, shows entire unfitness to discharge it, by failing to recognize the fact that the child is a human being, with the most far-reaching, undeveloped possibilities of mind, heart, and character, affecting its destiny indefinitely in the future.

The nurture of a child properly considered, is in no wise confined to its temporal and material support and maintenance, embracing feeding, clothing and caring for the body. Neither ought the child's prospects for worldly prosperity or future to be balanced against that far higher and nobler opportunity, which the child may have for intellectual and spiritual nurture and cultivation.

Property considerations must receive their due weight, but the prospect for future business and pecuniary success must not shut out the possibility of achieving those more important and exalted ends, upon which the future happiness and highest success of the child may depend.

The parents of these children, Charles Luck and Anna (formerly Scanlon) were united in wedlock on June 16, 1889.

Anna Luck departed this life about four years ago, and Charles Luck died about three months ago, surviving his wife and the mother of these children about four years and upwards.

Charles Luck was a non-Catholic in religious persuasion, but whether a member of any church of any Protestant denomination, the testimony does not disclose. Anna Scanlon was a Roman Catholic by ancestry, birth, education and religious persuasion, and was in good standing in the Roman Catholic church.

The marriage took place at Berea, O., and at her special instance and solicitation, in the Catholic church at that place; and as a preliminary to the marriage, a permit or dispensation was received from the Right Reverend Roman Catholic Bishop of the Diocese of Cleveland, to authorize the marriage in the church, Mr. Luck being a non-Catholic.

As a part of the bond of union between said parties, and in order that the marriage should take place in the church and receive the sanction of the church, the following agreement was signed by said Charles F. Luck:

"Agreement to be signed by all non-Catholics wishing to contract marriage with members of the Catholic church.

"I, the undersigned, am not a member of the Catholic church, wishing to contract marriage with Anna Cecelia Scanlon, and proposes to do so with the understanding that the marriage bond thus contracted is indissoluble except by death; and I promise that Anna Cecelia Scanlon

Cuyahoga Probate Court.

shall be permitted to freely exercise religion according to her belief, and that all children of either sex born of this marriage, shall be baptized in the faith and according to the teachings of the Catholic church. I further promise that no other marriage ceremony than by a Catholic priest shall take place.

"Charles F. Luck.

"Signed in the presence of the pastor of St. Adelberts, this 16th day of June, 1889."

Up to the time of the death of said Anna Scanlon Luck, the testimony discloses the fact that the promises of this agreement were faithfully performed.

The children, now the orphans for whom guardianship is to be established, were baptized into the Catholic church, and Mrs. Luck, during her married life, attended faithfully to her religious duties and died in the Catholic faith.

The testimony further discloses that upon her death, Charles Luck openly, and with strong expressions of bitter prejudice, announced that said children should no longer be nurtured in the Catholic faith, using language that evidenced a total disregard for the memory of their mother, expressing the most bitter and inveterate prejudice and hatred of the Catholic religion. He notified all his relatives, to use his own expressions, "the Catholic side is gone;" "the Catholic parent has gone now;" "I don't want these children brought up Catholics." He repeated these assertions, and indicated the strongest intention to utterly repudiate the promises that he had made at the marriage altar, and so solemnly subscribed, as a part of the consideration entering into his marital relations with Anna Cecilia Scanlon.

There can be no question but that this ante-nuptial agreement was based upon the highest and most sacred consideration, and is a covenant of the highest order and most solemn import.

As between the parties to this marital relation, when the wife was living, the binding force and inviolability of this compact would be recognized by all courts, and sanctioned by the moral sense of all mankind. Did it become dissolved and lose its force at the death of the mother of these children, and how far should this agreement enter into the determination of the custody and guardianship of these children which were thus, by this solemn covenant, dedicated to the Catholic faith before they were brought into the world? This question has caused the court no small degree of care and anxiety in its attempted solution.

If this controversy over the custody of these children was between the father and mother, a court would utterly fail in its duty not to make this agreement work an estoppel of the father's right to divert the course of religious nurture so provided for. He would not be heard to say in such a controversy, that the well-being of the children demands its viola-

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tion. It makes no difference that the education provided for them was to be Roman Catholic. An agreement entered into under like solemn circumstances to baptize the children and rear them in the Presbyterian, or any other Protestant denomination, would have the same binding operation in point of law.

The law gives force to such a compact in dealing with the rights of parents. But after such a covenant has been annulled or disregarded by the surviving parent, having the legal right of custody for years, and for years the nurture and growth of the child has been away from such a course of training, on the death of such surviving parent, in a contest for the custody between the respective relatives, as in this case, no such rule of equitable estoppel should be allowed to prevail over conditions which may materially affect the present and future welfare of the child.

But the court should not forget the wishes, expressed on her death bed, of the mother who bore these children, and which were in keeping with, and not contrary to, the father's solemn obligation and promise. If the lapse of years had not intervened, so effective in changes upon the young lives of these rapidly growing children, causing the formation of other attachments and relationships, the path of duty here would be plainer than it now appears.

There are other facts which must be conceded upon this evidence of an important nature. The death of Mrs. Anna Luck occurred something more than four years before these applications for guardianship were presented. Of course, at that time, the legal right of custody to these children devolved upon the father, and since that time, these children have been in the exclusive care of the sister and mother of said Charles Luck, and of himself. So far as the testimony discloses, the family of the mother have had no part or lot in the care and nurture of these children. From all that appears, they were at least impliedly excluded therefrom by the sentiments and wishes of their father.

The youngest child at the death of its mother, was of a very tender age, being then less than two years old.

Whatever may be said of the fact, the fact nevertheless, is important, that these children have been nurtured and cared for largely by the father's side of the house, and the family of their mother living in the same town, have done nothing to enforce and invoke any action under this agreement in regard to the education of the children.

Whatever nascent tendencies and dispositions in the way of religious education they have received, has been of the nature that would be in its tendency, non-Catholic.

I have dwelt thus much upon the religious statutes of this case because I believe that the well-settled policy of the law to consider these facts as very important conditions in determining the custody of children, and now that I may be justified in this statement, I wish to refer very

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briefly to some authoritative adjudications of the courts upon the subject.

Speaking of the duty of parents to their children, Blackstone pronounces the duty of the parent to educate his child to be of the greatest importance, and this importance is enhanced by the consideration that the usefulness of each new member of the human family to society depends chiefly upon his character as developed by the training he has received in early life. As Puffendorf says in his "Law of Nations," the parent who suffers his child to grow up like a mere beast, to lead a life useless to others and shameful to himself, has conferred a questionable benefit upon him by bringing him into the world.

The question of religious education has often arisen under English law. It has been laid down as a rule that where one has left in his will no direction as to the religion in which his children are to be educated, it will be presumed that his wishes were that they should be educated in his own religion, and that the child's preference will not be consulted on the subject, who is only ten years of age, and that the father is allowed to designate a plan of education to be followed with respect to their education after his death.

During the reign of extreme Protestant sentiments in England, it was considered the duty of the court of chancery of that realm, to see that all infants under its control, should be brought up in the Protestant religion. With the progress of religious toleration, came a different practice; and it is now a question whether the court would, under any circumstances, interfere with the testamentary guardian and the infant's religion, as designated by the father. Indeed, the Roman Catholic faith appears in this respect as much favored as the Protestant.

The conclusion, however, is irresistible that the courts have gone to the very verge of reason in sustaining the right of the father to direct as to the religious instruction and education of his child, even against the mother's religious convictions or that of the children themselves, See *Agar-Ellis v. Laselles*, 10 L. R., Ch. D., and other cases cited.

This English rule, however, under American policy, cannot be adhered to. Our municipal law in general has more regard for the infant's condition, and this whole jurisdiction calling upon judicial authority to keep in view its best interests and the exercise of this highest discretion in such case, is a matter of great embarrassment and responsibility. I have found the substance of the foregoing statements of law contained in Schouler's Domestic Relations, sec. 285. But we are not without more direct and specific judicial authority. In some of the states of our union there are statutes which regulate this matter of the religious education of minors. Notably in the state of Missouri, a statute is in force which prohibits committing the care of a child to a person of religious persuasion different to that of the parents of the minor, if another suitable person can be found.

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It has been held that the purpose of the enactment of this statute was to secure in the matter of guardianship, the absolute equality before the law of all forms of religious faith.

This statute came up for construction before the Supreme Court of Missouri in *Voullare v. Voullare*, 45 Mo., 602. In that case the court decided that "Where no person of the faith of the parents offered to take the children, and a person of different faith, every way suitable otherwise, offered to take charge of them, it was held that the action of the court in committing the care and custody of the children to this person was in no way a violation of the statute."

The case is one of considerable value and instruction, if not of authority, bearing on some of the questions which arise in the case at bar. The child whose custody was sought was of Catholic parentage, and the court, on page 607 of the report, says: "The court of probate evidently sought to conform its order to the spirit of this law, but still, had any Catholic family as near and as interested in the welfare of the children as was Mr. Murray (the person appointed) and suitable otherwise, offered to take the children, it would have been the duty of the court to have committed them to his guardianship; but the record does not show that any Catholic, suitable or otherwise, offered to take the children, and it was not reasonable to expect it of anyone outside the circle of relatives. Mr. Murray had property and no children; Mrs. Murray was their grandmother; one of the daughters had been partly reared by them; they were undoubtedly attached; no opportunity offered of guardianship of the parents' faith, and what more just and natural, as well as lawful, than to commit them to this family?"

A case arose under the same statute in the St. Louis court of appeals, in which this law received further liberal interpretation. It was a proceeding in *habeas corpus*, and is entitled "In re Laura Doyle," 16 Mo. App., 159. This case is also a very instructive case on the point made under this statute.

In this case the controversy for the custody of the child, Laura, who was eight years old, arose between a sister of a Roman Catholic order called "the Sisters of Loretta," having a boarding school of high grade in the city of St Louis, and other stations in different places in the United States.

The respondent was a non-Catholic master mechanic, earning good wages, whose wife had been bred a Catholic, but had married outside of the church. The respondent was by marriage an uncle to the child, and the child had been placed in his family by her father.

The father and mother of the child were both Catholics, although her father was not a strict religionist of any sort, and his habits and conduct were not commendable. The court finally placed the child temporarily in charge of the sister of the religious order referred to. On page

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168 the learned judge uses the following language: "The child is at the age when impressions made are deep and permanent, and if we refuse this application, she may remain long in the custody of persons, who, however moral and attached to her and capable of supporting her comfortably according to her state of life, are confessedly indifferent to matters of religious belief; one of them regarding all religions as very much alike, and the other having so weak a belief in the form of christianity in which she was educated, that she received what is regarded by the believers in that creed, a sacrament at the hands, or (if he is not to be regarded as the minister of it) at least in the official presence, as a minister of religion, of a clergyman of a hostile religious body, and has for years abandoned all outward profession of her belief, and all attendance upon its services, and all use of the ministrations of her church, and habitually attended other services."

So it is made to appear that even under a statute like that of Missouri, where the religion of the parents is treated as important, and respect must be given to religious considerations in the fixing of the guardianship, nevertheless, the courts seek after, and endeavor to attain, what is conceived to be for the best and highest welfare of the child.

The laws of the state of Pennsylvania as to the selection of a guardian for a minor on the subject of religious education are similar to those of Missouri. By the Pennsylvania statute, the court, in the appointment of guardians, is required to prefer persons of the same religious persuasion as the parents when practicable.

In Nicholson's Appeal, 20 Pa. St., 50, the court held, however, that a difference in such religious persuasion is not a ground for the discharge of a guardian, if no restraint is put upon the conscience of the minor, nor the impressions made by the parent on the mind of the child attempted to be effaced. On this point the court uses very strong language. "The law which forbids the appointment of a guardian whose religious faith differs from that of the parents, should be most strictly obeyed whenever it is practicable, for reasons so many and so obvious that they need not be repeated. But it is no cause for discharging one from a trust with which he is already clothed. A guardian can only be removed from his management for misconduct, and certainly man's religious opinions are neither the one nor the other. But if he should attempt by any harsh or unfair means, to erase the impressions made by the parents on the mind of the child, and much more if he should put its conscience to any kind of torture, the law would not only justify, but demand his removal." Such are the words of the late Chief Justice Jeremiah Black, one of the ablest statesmen and jurists this country has ever produced.

Again, in the appeal of Catherine E. McConn, 49 Pa. St., 304, the orphans' court, against the choice of a minor over fourteen years of age, had appointed a guardian of the same religious persuasion as the child's

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parents, and it was held that, even where the minor was seventeen years of age, the court in adhering to the provisions of the statute had not committed error nor abused its lawful discretion.

The most remarkable decision, and the most helpful and suggestive, if not authoritative, in dealing with the case before the court, is found In re Anne Turner, 19 N. J. Eq., 434. The summary of the points decided is contained in a brief syllabus, as follows: "In the absence of any direction or expressed preference by the father, as to the guardianship or religious education of an infant child, the clearly expressed wishes of the mother will be regarded, and where application was made for the guardianship of the child by both paternal and maternal grandfathers, both being of equal competence and fitness, the guardianship was given to the maternal grandfather in accordance with the wishes of the mother."

The facts proven on these applications are in some important points just the opposite of those upon which the New Jersey judge relied. In this case at bar, both father and mother expressed decided wishes and preferences as to the religious education of these children.

On her death bed the mother charged it as a sacred duty upon her relatives to see that her children were reared in the Catholic faith. On the other hand, it is proven beyond controversy that the father, who survives her several years, was vehement and urgent in his expressed purpose and wish to have them reared—not in any particular Protestant church—but as non-Catholics, or perhaps it were better to say, anti-Catholics.

Passing now from this feature of the case, I advert briefly to points of law which have been settled by our own Supreme Court. On the general subject of the rules which should control the jurisdiction of the court in fixing the custody of minors, no more fruitful case can be found than that of Clark v. Bayer, 32 Ohio St., 299. As bearing upon several points arising in this controversy, I quote, (p. 305) a portion of the decision:

"When the question of custody arises between the father and mother, or between either of them and another, as to rightful custody, and the minor is of an age to make an intelligent and discreet choice, courts will respect the minor's election. When the child is too young to exercise judgment in making a choice, courts are never restrained by any supposed absolute right of custody in either parent, but will direct the custody where the best and highest interests of the infant will be subserved.

"It sometimes happens that parents have abandoned their minor children, or by an act and word transferred their custody to another. In such cases, where the custodian is, in every way, a proper person to have the care, training and education of the infant, and the court is satisfied its social, moral and educational interests will be best promoted

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by remaining in the custody of the person to whom it was transferred, or received, when abandoned, the new custody will be treated as lawful and exclusive.

"After the affections of both child and adopted parent become engaged, and a state of things has arisen which cannot be altered without risking the happiness of the child, and the father wants to reclaim it, the better opinion is that he is not in a position to have the interference of a court in his favor. His parental rights must yield to the feelings, interests and rights of other parties acquired with his consent."

Keeping in view all that has been said in considering the legal aspect of the case, what should be the result and conclusion in dealing with the facts shown to exist in regard to these children?

There are several propositions settled by our court: The first and most controlling proposition established by a great preponderance of judicial authority, is this: That the court must determine the custody with a paramount regard to the highest welfare and best interests of the child. I must take the facts as I find them. It seems to have been the fate of these children to have fallen into the hands of the paternal relatives years ago. Their father was their natural guardian, and he exercised undisputed control of them almost from their infancy. They were domiciled with, and cared for by his mother, the old lady who now shows such solicitude for them, and the father's sisters. During all these years, these children, if not excluded from the maternal relatives, were at least not much cared for, nor frequently visited by these relatives. They have all resided in the same place and yet, so far as the evidence discloses, neither the uncle Daniel Scanlon, nor his sisters, their aunts, Mrs. Quinn nor Mrs. Green, had anything to do with the children.

I am not in any sense censuring them as for any neglect of duty. The father of the children manifested such a spirit and sought to so alienate the children, that probably they could not seek to manifest much interest in them, without stirring up bad feeling, and they wisely refrained from disturbing the peace of the children and engendering an unseemly family feud. But this is an important fact in the case which cannot be overlooked.

The family of Mr. Scanlon is virtually estranged from these children. Their affections have grown into the affections of the relatives of their father, and the relatives of their mother, however commendable their motives and purposes in seeking the custody of the children, now are strangers to them, and a new acquaintance and a new relationship would have to be established. Perhaps it should be said that these children are of such tender age that their attachments are not strong, and their habits of life are not fixed, and that such a change would not be detrimental or a shocking rupture of relationship; but in considering the well-being of the children, these facts must not be ignored.

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In point of ability to maintain, educate and support these children, both these applicants stand on a footing fairly equal. Neither of them are men of any considerable property. Mr. Klink, their uncle by marriage, who makes application for their custody, is a man of excellent character and reputation, does not own property to any considerable value, but is employed in a fairly lucrative and honorable vocation—that of fruit raiser—and is apparently of mature judgment and of kindly disposition.

On the other hand, Daniel Scanlon has acquired since this application was made, as the court has been informed, title to the property owned by his parents in Berea, O.; is working by the month on the railroad, is a stone-cutter by trade, twenty-nine years of age and unmarried.

Mr. Klink has no children; his wife, who seems to be a woman of average intelligence and fair disposition, is an aunt of these children, but as I understand the evidence, these applications also stand on a parity in another respect.

Neither of these guardians are seeking the custody of these children for the purpose of permanent control and nurture of the children. On both sides the ultimate custody and domicile of the children is to be with the relatives, should either application be granted. Mr. Scanlon seeks the custody of the children to place them each respectively with his two sisters. Mr. Klink thinks that possibly he might take the permanent custody by adoption of one of the children, but his brother-in-law living here in Cleveland, Ohio, will probably seek the custody by adoption of the little girl, Lily, so that the court has not been obliged to look beyond the mere temporary custody, should it be awarded to the one or the other, nor have regard to the ultimate custody which the guardianship may facilitate.

Had this application been made by Mr. Scanlon for the guardianship of these children shortly after the death of the mother, there could have been no question as to the consideration the court would have given to the matter of the religious and spiritual education agreed upon by the parents. It would have been the controlling condition in the situation; but the children were allowed to remain with Mr. Luck during his lifetime, and legally he had the right of custody, and the children have grown into the affections of the relatives on the father's side, now asking to retain them, and there being no preponderating circumstances establishing that the best interests of the children will be better subserved by any change, I have decided to leave them where they are.

The application for guardianship is temporary and is within the control of the court, and further consideration of this matter may arise upon a petition for adoption, and upon such application the court must hold itself perfectly free to render such judgment as the law and the facts may require.

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The application of Philo M. Klink for letters of guardianship is granted; that of Daniel Scanlon is dismissed.

Irving W. Hershey, for applicant Klink.

Whelan & Weld, for applicant Scanlon.

ERROR—PROBATE COURT—JURISDICTION.

[Warren Common Pleas, 1900.]

* JOSEPH H. MUNGER v. THOMAS JEFFRIES.

1. REMOVAL OF EXECUTORS AND ADMINISTRATORS.

The jurisdiction of the probate court in the matter of removing executors and administrators, under secs. 524 and 6017, Rev. Stat., is exclusive, and its exercise can be reviewed only for fraud, or for palpable and manifest abuse of power, and upon complaint by a party whose substantial rights are affected thereby.

2. EXECUTORS REMOVED CANNOT PROSECUTE ERROR.

The individual rights or interests of an executor, who is not an heir, devisee legatee or creditor of the estate, and is interested therein only as executor, are not prejudiced by an order of removal, under sec. 6017, Rev. Stat. Such executor cannot, therefore, prosecute error for the reversal of the order relieving him of the trust.

VAN PELT, J.

On April 4, 1889, the last will of Christian B. Odell was admitted to probate. By the fifth item of said will Susana Odell (wife of the testator) and Joseph H. Munger were appointed executors, to act as such jointly during the life of the wife, and after her death Munger was to be the sole executor. Both qualified as executors and entered upon the trust. She died November 5, 1897. After that time Munger continued to administer the trust. On May 27, 1898, a motion was filed in the probate court by one Thomas Jeffries, asking his removal as surviving executor for the reasons in said motion stated, which were, in substance, that he had failed to make and file a true and correct inventory and appraisement of the estate; that he had purchased and was negotiating for the purchase of the interest of certain legatees under the will; that after the death of the wife, he had leased certain of the lands of the estate contrary to the provisions of the will which required the sale of the lands at her death; that he had made large expenditures on account of the estate contrary to the will and without the consent of the legatees or authority of the court; that he had failed to carry out the provisions of the will in reference to the sale of the property, after the death of Mrs. Odell, but had by leasing the lands lessened their value and prolonged indefinitely the time when the same could be sold; that by failing to perform his duties, under the will, the estate had suffered loss and

* This decision was affirmed by the circuit court, unreported, and the circuit court was affirmed by the Supreme Court, unreported, 61 Ohio St., 000.

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depreciation, and the legatees growing restless, under the delay, had brought a suit in partition; that he had attempted to dispose of real estate without an order of court and contrary to the will; and that he had been guilty of other acts and derelictions of duty sufficient to warrant his removal. Notice of the pendency of the motion was duly served upon Mr. Munger.

On July 1, a motion was made to strike out the last clause of the motion to remove, namely: The clause in which it was charged generally that the executor had been guilty of other acts of dereliction not specifically set forth in other clauses of the motion. This motion to strike out was sustained, and by leave of the court an amendment to the original motion was filed, charging that Munger was incompetent and not a proper person to administer the estate. On July 2, a hearing was had in the probate court, and the motion to remove was sustained on the ground as stated in the entry; that said Munger had been guilty of gross neglect of duty; had not administered the trust to the best interests of the estate and was an unsuitable person to administer the trust; and an order was made removing him as executor, and directing him to file his final account within thirty days. A motion for a new trial was filed and overruled, exceptions were taken, and on July 11, a petition in error was filed in this court by said Joseph H. Munger.

The errors assigned are: That the probate court had no jurisdiction or power to remove said executor on the motion of said Jeffries; that the probate court erred in admitting certain evidence upon the hearing in that court; that the court erred in overruling the motion of Munger to dismiss the proceedings for want of sufficient evidence to sustain the motion to remove; because the finding of the court was not sustained by the evidence; that the order of court was not made upon any ground stated in the motion to remove; and for other errors apparent on the record. Service of summons in error was duly made upon the attorney for said Thomas Jeffries, and the petition is now before this court. The matter comes up first upon a motion made, *ore tenus*, to dismiss the petition in error for the following reasons in substance, as stated by counsel:

First: Because no substantial right of the present plaintiff in error has been affected by the order of the probate court removing him from the trust.

Second: Because the jurisdiction of the probate court in the matter of removing administrators and executors is exclusive, and error will not lie to review the action of that court, either in removing or refusing to remove, which is by the statute committed to the sound discretion of the probate judge.

We will consider these propositions in their order. It is a fundamental rule that in order to justify the reversal of an order or judgment,

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the party seeking such reversal must be one whose substantial rights are prejudiced by the judgment or order complained of. He must show not only that error intervened, but that he was prejudiced thereby. Scoven v. State, 6 Ohio St., 288, 294; Baker v. Lawrence, Adm'r, 27 Ohio St., 418; Noble v. Martin 2 Circ. Dec., 598.

It does not appear from the record that Mr. Munger has any interest in this estate. He is not a legatee. He would not have been an heir at law had Odell died intestate. He shared the confidence and esteem of the testator, and was named an executor. In this trust capacity he assumed—under the will and the law—certain responsibilities, was charged with the performance of certain duties, and for the purposes of the trust, was clothed with certain legal rights. All his rights and duties pertained to him as executor, and only while that relation continued, except the duty of filing a final account, imposed upon him by law and the order of the court. His individual interests are not affected by his removal. While he continued in the trust, he was entitled to a fair compensation for the responsibility assumed and the labor performed. When the trust capacity was terminated his compensation ceased and his duties ended. The one was intended to be the fair equivalent of the other. He had no right to continue the trust merely that he might receive the recompense and no other individual right was involved. When he shall file his final account his duty will be fully performed. As executor he was but an arm of the court, an instrument of the law in the administration of an important trust. The duties pertaining to that relation might be enforced against him, and the rights belonging to it he might enforce against any and all other persons in the interest of the trust. In this interest alone he exercised the powers and performed the duties, and no individual right was prejudiced by the order relieving him of all further duty in the further administration of the estate.

Further: By sec. 524, Rev. Stat., it is provided that "the probate court shall have exclusive jurisdiction * * * to grant and revoke letters testamentary and of administration." Section 6017, Rev. Stat., provides that "the probate court may at any time remove an executor * * * he having twenty days notice thereof for * * * gross neglect of duty, incompetency * * * or any other cause, which in the opinion of such court renders it for the interest of the estate that such executor * * * be removed, and * * * if there be no other executor * * * to discharge the trust, the court may commit the administration of the estate not already administered to some other person or persons." The probate court, in this case, as shown by the transcript, found this executor had been guilty of gross neglect of duty; had not administered the trust to the best interests of the estate; and was an unsuitable person to continue in the trust. It is said that the

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entry on the journal of the court is not supported by and does not agree with the stenographer's report of the oral opinion delivered by the court in sustaining the motion to remove. A court speaks by its record, and not by its oral or even written opinions, which are not required to be made a matter of record, and have no proper place in a bill of exceptions. This court must look alone to the entry on the journal, as embodying the real findings of the court below upon the motion. Can these findings be reviewed on error in this court, either on the ground that that court erred in admitting evidence upon the hearing, or on the ground that the finding is not sustained by the evidence?

In Gregory's Adm'r's, 19 Ohio, 857, an administrator who resigned filed a final account, which was referred to a special master by the court of common pleas, which then had exclusive jurisdiction in probate and testamentary matters, and the special master filed his report. On motion this report was set aside, the court being of opinion that, as a court of probate, it had not pursued the proper course in settling the account through a master. A writ of *certiorari* was allowed, but a motion was made to dismiss the writ, and the question was reserved for decision in the Supreme Court. The motion was sustained. The court holding, that as exclusive jurisdiction in probate and testamentary matters was vested in the court of common pleas, the order of that court in the progress of such matters could not be interfered with by the Supreme Court.

It is argued that the reason for this holding was that under writs of certiorari the lower courts could not be required to certify up the evidence on which their findings and orders were predicated; while now, by bills of exceptions, the evidence may be taken from the reviewing court. An examination of the decision, however, makes it plain that it was based upon the exclusive nature of the jurisdiction of the common pleas court, and not upon the manner in which the question came before the reviewing court.

In Gilliland v. Adm'r of Selles, 2 Ohio St., 228, it was held that an order of the probate court in a matter within its exclusive jurisdiction was not the subject of revision in the higher courts.

In Frazer v. Fulcher, 17 Ohio, 260, the Supreme Court on writ of certiorari reversed an order of the common pleas court appointing an administrator for the estate of a person on the ground that he had been imprisoned in the penitentiary under a life sentence. In the opinion, after quoting the provision in the constitution of 1802, conferring jurisdiction in probate and testamentary matters upon the common pleas court, the Supreme Court say: "By the construction which has been given to this clause of the constitution, it has been uniformly held, that no appeal could be taken from the court of common pleas, in any matter merely of a probate nature, nor

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could any such matter be reviewed in this court by writ of error or certiorari." The court, however, held that as the law provided only for administration upon the estates of deceased persons, that case was not brought within the jurisdiction of the court under its probate or testamentary powers.

In *Todhunter v. Stewart*, 39 Ohio St., 181, it was held that where the probate court, without waiting a reasonable time for the next of kin to apply, appointed a stranger as administrator, the appointment was illegal and that the decision of the common pleas court affirming on error the judgment of the probate court was properly reversed by the district court. This was upon the ground that the probate court, in the exercise of its exclusive jurisdiction in the appointment of administrators, must pursue the statute regulating the manner in which that jurisdiction should be exercised; and that there was no power in the probate court to appoint a stranger as administrator without allowing a reasonable time to the next of kin to make application.

In the case at bar, the order sought to be reversed was plainly and clearly within the jurisdiction of the probate court, under secs. 524 and 6017, Rev. Stat., Munger was acting under the will and letters testamentary granted by that court. An application was made for his removal upon grounds covered by the statute. Due notice was served. There was jurisdiction both of the person and of the subject matter. That jurisdiction is, by the express term of the statute, exclusive. It is not a question of want of power, but of alleged erroneous exercise of power. If the exercise of such power can be reviewed, upon the weight of the evidence, then it is not exclusive. In this sense exclusive jurisdiction means jurisdiction confined to the probate court, and to be by that court possessed, enjoyed and exercised independently.

The statute (sec. 6017) is very broad and comprehensive in its provisions. An examination of the course of legislation on the subject shows that the legislature has thought it wise to enlarge and extend the power and jurisdiction of the probate court in the matter of removing executors and administrators, until its jurisdiction in such matters has become practically, if not entirely, without limitation. The policy of the law is to secure a speedy settlement of estates. To this end large powers are committed to the probate court in the matter of selecting the person who shall administer such trusts. And so long as these powers are exercised in the manner and within the limits of the jurisdiction conferred, the orders of the court are not subject to review on error.

In *Estate of Still*, 15 Ohio St., 484, it was held that an appeal would not lie from an order of the probate court removing an administrator; and in *Ebenole v. Schiller*, 50 Ohio St., 701, it was held that an appeal would not lie from an order of that court refusing to remove an administrator. While these cases are not directly in point, based as

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they are upon the language of the statutes regulating appeals from the probate court and the course of legislation relating thereto, yet the very fact that no provision has been made for an appeal in such matters, plainly implies a purpose to leave such questions within the sound discretion of the probate court, and not reviewable on error, except where a manifest abuse of discretion is shown.' *Goldsmith v. Hand*, 26 Ohio St., 101, 108; *Clark v. Clark*, 20 Ohio St., 128, 135; *Beaumont v. Herrick*, 24 Ohio St., 445, 458; *Legg v. Drake*, 1 Ohio St., 286; *Oil Company v. The Railroad Company*, 4 Circ. Dec., 670. As the motion to dismiss must be sustained, for the reasons before stated, the court has not found it necessary to look fully into the merits of the case upon the evidence.

The motion to dismiss the petition in error is sustained. In order to place the question and ruling of the court plainly upon the record, let a written motion, embodying the grounds of the oral motion be filed and a judgment sustaining it and dismissing the petition entered, to which exceptions may be noted.

Pat Gaynor, W. C. Thompson, and Ivins & Dechant, for plaintiff in error.

Burr & Brandon, and Runyan & Stanley, for defendants in error.

BOARDS OF EDUCATION—SCHOOLS—BIBLE READING.

[Clinton Common Pleas, 1900.]

BOARD OF EDUCATION (NEW ANTIOCH) v. EVA PULSE.

1. MANAGEMENT OF PUBLIC SCHOOLS.

The management of public schools is by express statutory provisions under the exclusive control of boards of education. Each board is required to "make such rules and regulations" for the government of the schools under its control as "it may deem expedient and necessary."

2. ACTION OF BOARD OF EDUCATION FINAL.

Where a board of education, in the exercise of this authority conferred upon it by law, has seen fit to pass a resolution prohibiting the reading of the Bible and prayer or other religious instructions in the school, its action is final and cannot be reviewed by the courts.

3. TEACHER AGREES TO FOLLOW ADOPTED RULES.

A person in accepting employment as a teacher in the public schools agrees to perform her labors and duties under the control and direction of the board of education and in conformity to such lawful rules and regulations as the board may adopt.

4. MAY BE DISCHARGED FOR FAILURE TO OBEY RULE.

Where the board has made a rule, prohibiting such religious exercises and a teacher, after due notice, refuses to obey the rule and continues such exercises, such act of insubordination on the part of the teacher is a violation of her contract for which she may be discharged.

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5. INJUNCTION SHOULD NOT BE ALLOWED.

In such case a court of equity ought not to interfere by injunction to restrain the teacher from continuing the religious exercise in violation of the rule. Considerations of public policy and convenience require that the board should assume the whole responsibility in the matter, and either dismiss the teacher or rescind the rule.

VAN PELT, J.

Section 4017, Rev. Stat., of this state provides that: "each board of education shall have the management and control of the public schools of the district with full power to appoint—teachers," etc.

Section 8985, Rev. Stat., provides that: "The board of each district shall make such rules and regulations as it may deem expedient and necessary for the government of its appointees and pupils."

The constitution of this state, art. 1, sec. 7, provides that: "All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience. No person shall be compelled to attend, erect or support any place of worship, or maintain any form of worship against his consent; and no preference shall be given, by law, to any religious society; nor shall any interference with the rights of conscience be permitted. No religious tests shall be required, as a qualification for office, nor shall any person be incompetent to be a witness on account of his religious belief; but nothing herein shall be construed to dispense with oaths and affirmations. Religion, morality and knowledge, however, being essential to good government, it shall be the duty of the general assembly to pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of public worship, and to encourage schools and means of instruction."

The board of education of Cincinnati, some years ago, passed a resolution prohibiting the reading of religious books, including the Bible, in the common schools of that city. The question of the power of the board to pass the resolution came before the Supreme Court of this state in the celebrated case of the Board of Education v. Minor, 23 Ohio St., 211. The Supreme Court in that case sustained the board of education, held the resolution to be valid, and in construing the above constitutional and statutory provisions declared the law as follows:

"First: The constitution of the state does not enjoin or require religious instruction, or the reading of religious books in the public schools.

"Second: The legislature, having placed the management of the public schools under the exclusive control of directors, trustees and boards of education, the courts have no rightful authority to interfere by directing what instruction shall be given, or what books shall be read therein."

The petition in the case now before the court avers that the defendant, Eva Pulse, in August, 1899, entered into a contract with the board

Board of Education v. Pulse.

of education of New Antioch S. S. Dist., whereby she engaged and contracted to teach as a principal teacher in said district, for the term of eight months, and entered upon the performance of her duties under said contract. It is further alleged that on January 2, 1900, said board of education passed a resolution prohibiting religious instruction and the reading of religious books, including the Holy Bible, in the schools of said district, and that on January 3, a copy of said resolution was served on said defendant.

It is also averred that the defendant, "notwithstanding the passage of said resolution, and with full knowledge of the same, refuses to comply with the requirements of said resolution, but wholly ignores the same and denies the right of said board to determine and direct as to the matters set out in said resolution, or to control her conduct as to the reading of said book called the Holy Bible, or to control her in any form of worship she may see fit to adopt, and in full defiance and disregard of said resolution and notice of the same, opened said school each morning by reading at length portions of said book, called the Holy Bible, followed by prayer," and further that she "threatens to and will continue such reading, praying and other religious teaching, unless restrained by the order of this court," and the prayer of the petition is for an injunction restraining her therefrom.

On the filing of the petition a temporary restraining order was granted, until the matter could be regularly heard on its merits. A demurrer has been filed to the petition. This presents the question whether the board is entitled to injunction to enforce this resolution.

By her employment, Miss Pulse agreed to the following:

First: That she would teach the branches of study required by the law and the course of study for her department.

Second: That she would preserve order and enforce proper discipline in her department.

Third: That she would perform her labors and duties under the control of the board of education and in conformity to such lawful rules and regulations as the board might adopt.

This part of her agreement has both an affirmative and negative aspect; that is, she agreed to do such acts and things as she was by positive rule required to do, and that she would not do that which she was required to abstain from doing—to do what she commanded, and not to do that which was inhibited.

By the rule in question, which was one which the board, as the Supreme Court have decided, might lawfully make all teachers in the schools were prohibited from reading the Bible and prayer in the school for the reasons set forth in the resolution. This inhibition she refuses to obey. It is not a case of inefficiency, neglect of duty, immorality or improper conduct. It is an act of active insubordination amounting to a breach of her contract, and gives the board a right to terminate the

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contract by discharging her. The question is: Are they bound to pursue that course? Are they bound to terminate the contract? Or may they apply to a court of equity to restrain her act of insubordination, leaving her to perform her duties as a teacher in accordance with her agreement?

The members of a board of education are public officers, charged with the performance of important public duties. They are bound under the solemn obligations of an oath "to perform faithfully the duties of the office." In selecting such officers, the electors of each district are presumed to exercise judgment and discretion, and the members chosen are presumed to understand the local conditions and the interests of the schools committed to their control and to act with intelligence and fairness in the performance of their duties. If such men are not chosen, the fault lies with the electors and the remedy is the ballot.

When a board has passed such a resolution as that involved in this controversy the members are presumed to have acted fairly and to have exercised their best judgment. If their action does not meet public approval, the public has its remedy. While such rules continue in force they must be obeyed. If a teacher may openly defy the lawful rule of the board in such a matter, the legal power to make such rules becomes of no avail and there is an end of official control. Whether the rule adopted in this case was wise or unwise, reasonable or unreasonable, is not a question for the court to determine, and was not a question for the teacher to consider. The power to determine such matters has been by the law committed to the board. To it belongs the power and with it lies the responsibility and not with the teacher. If the rule is pernicious in its effect and obnoxious to the public sentiment of the patrons of this particular school the remedy is obvious and is at hand. It is to be found where are to be found all remedies for bad government—with the people themselves. The remedy is not in counseling, advising or committing an act of insubordination, which is both a defiance of lawful authority, and on the part of the teacher a plain breach of her contract. How far conscience can be appealed to by a teacher to justify a violation of her contract would seem to be a matter about which there could not be two opinions. Miss Pulse was not employed to read the Bible nor to pray. No religious test is required of teachers in the public schools, nor are any religious duties enjoined upon them. An applicant for a teacher's certificate may be a Jew or a Christian, a Protestant or a Catholic, a believer or unbeliever, and if otherwise qualified, and of good moral character, the board of examiners is required by law to issue a certificate. Both Bible reading and prayer are all right and proper, if required or allowed by the custom and rules of the particular school, which a teacher is employed to conduct. But if such practices are not permitted by those who have the lawful right to decide the matter, then upon every principle of moral duty and contract obligation, it is incum-

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bent upon those who teach in such schools to observe the lawful rules by which they have agreed to be guided in the performance of their duties. Such rules invade no civil or religious right of the teacher. She may still read the Bible, pray, attend church, teach in the Sabbath school and put forth every effort in her power to induce others, both young and old, to be religious, and to obtain the joys and rewards of a righteous life. Such a rule closes to her no legitimate avenue of religious effort for the duties of a school teacher are purely secular and her employment for other than religious labors. She may regard the young minds under her control as a suitable soil in which to sow the good seed of religious influence and may believe that the highest and best interests of her pupils are subserved by some religious instruction in connection with their daily exercises. But if those in authority think otherwise, it is her plain duty to respect the powers that be and to exercise her influence in this regard on other occasions and along other lines of effort. It cannot be conscience, but mistaken zeal or stubborn self-will that dictates any other course. This rule then, while it exists, must be enforced. Any other course on the part of the board would be to abdicate its powers and surrender its authority. If the board should become convinced that the resolution under the circumstances was injudicious and ill advised, it should repeal it. But while the rule continues in force, it is the duty of the board to exact obedience. This proceeding is an effort to that end; and the question is: May it adopt this remedy, or must it pursue the other course open to it and discharge the teacher? Or rather the question is: Is it incumbent on the court to lend its aid by the extraordinary remedy of injunction to enforce obedience to the rule?

There are classes of cases in which, according to well settled rules of equitable jurisprudence, a plaintiff, on the averment of a proper state of facts, is clearly entitled to the remedy of injunction. In such cases the court has no discretion in the matter. The plaintiff can demand the allowance of an injunction as a matter of right.

There are other cases in which, according to the same well established rules, a plaintiff is not entitled to the remedy. When such a case is presented, the court has no discretion, but must refuse the writ, and leave the party to pursue such other remedies, legal or equitable, as may be open to him.

But cases often arise which are of a special, novel or peculiar nature, and which do not fall within either of the plainly marked classes of cases just mentioned. They lie upon the border line. They possess peculiar features. They are not easily classified. In such cases the court may or may not grant the remedy by injunction as in the exercise of a sound discretion seems best under all the circumstances. In determining the matter the court must be guided by considerations of public policy and convenience. If upon the whole it appears in such cases the interposition of the court will best subserve the public interest

and convenience, the court should grant the writ. If on the other hand, it appears that there is another tribunal, or some official board clothed with power to act in the premises, and whose action may, under the power given, fairly meet the requirements of the case, the court should not interfere.

To which class of cases does the one before the court belong?

It is argued that it falls within the class where the court must refuse the writ. Three reasons are assigned for this position:

First: It is said no irreparable injury can result from the act of the defendant in continuing to disobey the rule.

Second: It is said that this contract could not be specifically enforced by the court, being one for personal services, of no unique or extraordinary character, and that where specific performance cannot be decreed, injunction will not lie.

Third: That the present plaintiff, the board of education, has an adequate remedy at law, and cannot, therefore, ask equitable relief. Let us consider these arguments in their order.

The law confers upon the board of education full and unrestricted power to declare by resolution or rule whether any religious exercises of any character shall or shall not be permitted in the schools under their control. Its action in the matter is not subject to review by the court. It is left to the members of the board to decide whether the necessities of the case require the adoption of a rule, and what that rule shall be. It is for them to determine whether the interests of the school will suffer by the reading of the Bible or other religious exercises, and if they so decided, the court cannot sit in judgment upon their action. Full power to act implies full power to determine when such action is necessary. When the board has acted, and the teacher has defied its lawful authority, the court cannot inquire into the nature or extent of the injury which will result from tolerating such insubordination on the part of the teacher. To do so would be to review the action of the board upon the question of the necessity for the rule. The question of irreparable injury does not enter into the case.

Again: Contracts of this character; that is contracts for personal services, never can be specifically enforced by an affirmative decree. And where the labor to be performed is to be done under the supervision of some person or board, obedience to such supervisory power cannot be enforced by a positive decree. The rule, therefore, that injunction will not be allowed to restrain the breach of a contract, when specific performance will not be decreed, can have no application to contracts for services, because such contracts never can be enforced by a positive decree, and the negative form of injunction may be the only method of enforcing them. But this means of enforcing the contract will not be adopted, except where the services are of unique or extraordinary character and another one than the one employed cannot be procured to

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render the same service. And there is no such unique or extraordinary services involved in this case.

This brings us to the argument that an injunction cannot be allowed in this case for the reason that the plaintiff has an adequate legal remedy, and, therefore, need not invoke the equitable remedy by injunction. Is this true? The word "remedy," as used in this connection, has been properly defined as the "judicial means of enforcing a right or redressing a wrong." It is the relief which may be afforded by an action at law. It is the remedy to be found in a court of law. In this sense the board of education in this case has no legal remedy for the insubordinate act of the defendant. It cannot sue her and recover damages, nor is there any other form of legal relief open to them. The right which it has to discharge her for a violation of her agreement to teach under the rules of the board is not a legal remedy, but a right which may be exercised without invoking the aid of any court, either of law or equity.

This case, therefore, does not fall within that class of cases, in which the court is by the settled rules of equity, precluded from granting an injunction, nor does it, on the other hand, come plainly within that class of cases, where an injunction will be decreed. While the right to discharge the defendant for a breach of her contract is not a legal remedy, but a private right, and, therefore, the existence of such right will not preclude the granting of an injunction, yet, the question remains, ought not the board to be required to exercise that right, rather than to appeal to the court for its interposition. This case, therefore, falls within that class of cases, where the granting or refusing of an injunction must rest in the sound discretion of the court to be determined by considerations of public policy and convenience.

The policy of the law is to vest in boards of education large powers in adopting rules and regulations for the government of the schools under their control. There powers in such matters as that now in controversy are unlimited. Their motives are not open to question or investigation by the courts. They are responsible only to their consciences and their constituents. With such large powers go equally large responsibilities. If the powers are to be exercised with a care and consideration commensurate with their importance, it is best that the members of such boards understand that they must take the full responsibility for the acts they do. It is evident that such duties will be performed with far more deliberation and care if the members understand that they must take the entire responsibility, and that they cannot appeal to the courts to determine whether they have acted wisely or unwisely, or to assume the duty of enforcing any rules they may choose to make.

Again: If teachers understand that they may defy the rule of the board, and submit the matter to the final judgment of a court, it will encourage insubordination and result in just such unseemly contro-

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versies as that now before the court, from which it is clear no possible good can result, either to the cause of education or religion.

While it may be a serious injury to the school to discharge the defendant now, when she has the school well in hand, and when it may be difficult to supply her place with an efficient teacher, yet if she remains obdurate and prefers to violate her agreement rather than submit to the rule of the board, it is better that the board if the rule remains to exercise its authority and discharge her, rather than that the court should step in and relieve the board from its responsibility on the one hand, or the defendant from the consequences of her ill advised conduct on the other. The court will leave the parties where it finds them, commanding wisdom, moderation and common sense to all parties interested. The demurrer is sustained, the injunction dissolved and the petition dismissed.

WILLS—STATUTES—AFTER-BORN CHILDREN.

[Hamilton Common Pleas, January Term, 1900.]

GERMAN MUTUAL INS. CO. v. HARRY W. LUSHEY, ET AL.

1. SECTION 5959, REV. STAT., DOES NOT REPEAL SEC. 5961, REV. STAT.

Section 5959, Rev. Stat., providing that if a testator has no children at the time of the execution of his will but shall afterward have a child living or born alive after his death, the will shall be deemed revoked unless provision is made for such child, or such child is in such a way mentioned as to show an intention not to make such provision, does not expressly, or by implication, repeal sec. 5961, Rev. Stat., providing that an absent child, reported dead, or a child born after the execution of and not provided for in the will, shall take the same share of testator's estate that he would have taken had testator died intestate, although the section first referred to was enacted some sixteen years after the section last mentioned. The two sections should be construed separately, as each was enacted to cover a particular case and neither is in conflict with the other.

2. RULE AS TO WILL IN CONFLICT WITH STATUTE.

A will bequeathing testator's estate to her husband and providing that "should any child or children (we have now only one, George Gabriel) be born to me hereafter, it shall in no wise change, alter or revoke this will and testament" is contrary to sec. 5961, Rev. Stat., and while sec. 5959, Rev. Stat., controls as to the child mentioned in the will and he takes nothing, a child born after the execution of the will takes the same share he would have taken had his mother died intestate. The provision of sec. 5959, Rev. Stat., relating to where a party has no children and executes his will and makes plain his intention to disinherit after-born children, cannot be read into sec. 5961, Rev. Stat., or allowed to defeat the claim of such after-born child.

DAVIS, J.

The plaintiff filed its petition setting out that, on September 30, 1892, George Lushey, one of the defendants herein, made and delivered to it a promissory note for \$10,000 due one year after date, with six per cent. interest payable semi-annually.

The plaintiff further says that, to secure the payment of said note, George Lushey, one of the defendants, executed and delivered to it a mortgage covering the real estate described in the petition.

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The plaintiff further avers that on or about February 1, 1898, the said George Lushey made a conveyance of certain real estate to Harry W. Lushey, one of the defendants herein, including the real estate described in the petition, and that the said Harry W. Lushey is now the owner of the same, subject to the lien of plaintiff.

Plaintiff prays for a judgment in the sum of \$10,000, with interest on the same from March 30, 1897, and order of sale, and for all proper equitable relief.

To this petition Harry W. Lushey, one of the defendants, has filed a separate answer, in which he admits that the property described in the petition of the plaintiff was conveyed to him on or about February 1, 1898, and he denies each and every other allegation.

And for further answer the defendant, Harry W. Lushey, avers that on or about the — day June of 1878, Caroline Lushey, the mother of this answering defendant, parted this life seized in fee simple of the premises described in the petition of plaintiff, leaving this defendant, Harry W. Lushey, and his brother, George G. Lushey, as her only children and sole heirs at law, and also leaving the defendant, George Lushey, as her husband surviving her.

This answering defendant, Harry W. Lushey, further says, that before his birth, and after the birth of his said brother, George G. Lushey, to-wit, on June 11, 1872, the said Caroline Lushey made and executed her last will and testament, whereby she devised said real estate described in the petition to her said husband, George Lushey, one of the defendants herein.

He further avers that he was not provided for in said will, and that by reason thereof this defendant, Harry W. Lushey, is the owner of an undivided one-half in and to said premises described in the petition of the said plaintiff.

Wherefore this defendant, Harry W. Lushey, prays that his title to the undivided one-half of the premises described in the petition be quieted as against the plaintiff and his co-defendants.

To the separate answer of Harry W. Lushey the plaintiff has filed its reply. It admits that on June 11, 1872, Caroline Lushey made and executed her last will and testament, whereby she devised the real estate described in the petition to her husband, George Lushey, and that said will was on March 8, 1879, duly probated in the probate court of Hamilton county, Ohio; and a copy of said will is attached to said reply and marked "Exhibit A."

The plaintiff denies that said Harry W. Lushey is the owner of an undivided half in the premises described in the petition.

The plaintiff and the defendants rely upon the construction of said will as to who is entitled to the undivided one-half of said premises; and the particular clause in said will which all parties agree settles the

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title, either in the plaintiff or in the defendant, Harry W. Lushey, as to the undivided one-half is as follows:

"In the name of the benevolent Father of all, I, Caroline Lushey, wife of George Lushey, of the city of Cincinnati, county of Hamilton and state of Ohio, do make and publish this my last will and testament. I give and devise to my beloved husband, George Lushey, all of my estate, real and personal, of which I may die seized of possessed, to have and to hold the same to himself, his heirs and assigns forever. Should any child or children (we have now only one, George Gabriel) be born to me hereafter it shall in nowise change, alter or revoke this will and testament."

Section 5959, Rev. Stat., of Ohio reads as follows:

"If the testator had no children at the time of executing his will, but shall afterward have a child living, or born alive after his death, such will shall be deemed revoked, unless provisions shall have been made for such child by some settlement, or unless such child shall have been provided for in the will, or in such way mentioned therein as to show an intention not to make such provision, and no other evidence to rebut the presumption or revocation shall be received."

That part of sec. 5961, Rev. Stat., that is applicable to this case reads as follows:

"When a testator, at the time of executing his will, shall have a child absent and reported to be dead, or having a child at the time of executing the will, shall afterward have a child who is not provided for in the will, the absent child, or the child born after the execution of the will, shall take the same share of the estate, both real and personal, that he would have been entitled to if the testator had died intestate."

The plaintiff contends that secs. 5959 and 5961, Rev. Stat., should be construed together. That is, that the part of sec. 5959 relating to where a party has no children and executes his will and specifically makes plain his intention to disinherit after-born children, should be read into sec. 5961.

The defendants contend that sec. 5959 provides for a case where a party has no children and executes a will, etc., and is to be construed by itself, and provides for a separate and distinct case, differing from that in sec., 5961, which section provides that, where a party has a child living at the date of the execution of his will, should any child or children be born to him after the date of the execution of such will, such child or children will inherit as if the testator had died intestate.

The question as to whether the defendant, Harry W. Lushey, has title in this property, depends upon the construction that shall be given to said will in view of sec. 5961, Rev. Stat. If the decedent, Caroline Lushey, had no children at the date of the execution of her said will, it is perfectly clear that, under sec 5959, her said will disinheriting any child or children that should be born to her after the execution of the same

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would be valid. It is also perfectly clear, from the language of said will—and the same is plain and explicit, and reads as follows: "Should any child or children, we now have only one, George Gabriel, be born to me hereafter, it shall in nowise change, alter or revoke this will and testament"—that she intended to disinherit any after-born children, and that it was clearly her intention that any after-born child or children should not participate in her said estate.

The legislature evidently intended, when sec. 5959, Rev. Stat., was enacted, to provide for a particular case; and, so far as the court has been informed and advised, said section was passed by the legislature on March 23, 1840; 38 O. L., 125, Sec. 40. And it is also clear that the legislature intended to provide for another case when sec. 5961 was enacted, because the original section was passed February 26, 1824; 22 O. L., 120, sec. 6. Section 5959 being enacted some sixteen years after sec. 5961, does not repeal sec. 5961, either expressly or by implication. And it is clear that, under sec. 5959, the legislature intended the enactment to cover a particular case; and it is just as clear that the same power intended sec. 5961 to cover another case, and neither of said sections is in conflict with the other.

Section 5961, Rev. Stat., has never been construed by the higher courts, and, so far as counsel and court have been advised, this is the first instance of the presentation of a case calling for construction.

Section 5959, Rev. Stat., has been construed with reference to some of its provisions, and particularly as to the provision in a will where a party intends to make provision for a child born after the execution of his will. See *Rhodes v. Weldy*, 46 Ohio St., 234.

As before stated, there is no doubt but that the deceased, Caroline Lushey, intended to disinherit any after-born children, and that she devised her property, both personal and real, absolutely to her husband, George Lushey, and that she, by said will, disinherited the child then living, George Gabriel Lushey, and that she clearly intended to disinherit any after-born children.

It is well settled in this state that the intention of a testator shall govern in the construction of wills, provided that said will is not contrary to law or public policy.

The Supreme Court has said, in *Carter v. Reddish*, 32 Ohio St., 1:

"In the construction of a will it is well settled as a paramount rule, in this state, that the intention of the testator, as gathered from the whole will, must control, when such intention is not in conflict with the law or against public policy."

It is clear, from the reading and the language of the will of said Caroline Lushey, that her said will is contrary to the statutory provision of sec. 5961, Rev. Stat., which section provides, in terms as plain and as clear as the will, that where a party has one child then living and executes a will, and afterwards a child is born to such person, such

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after-born child shall take his share the same as if the testator had died intestate.

Under this construction it gives to the after-born child his share in his mother's estate, and the child then living receives nothing, the father receiving the other portion.

The decree of the court is that the plaintiff is entitled to recover from the defendant, George Lushey, the sum of \$10,000, with six per cent. interest on the same from March 30, 1897; and that an order of sale be entered directing the undivided one-half of said premises to be sold; and that as to the other undivided one-half, the title to the same be declared to be in the said Harry W. Lushey, and that the same be quieted as against the said plaintiff and his co-defendants.

Rattermann & Ward and Chris. Von Seggern, for the plaintiff.
Renner, Gordon & Renner, for the defendant, Harry W. Lushey.

UNION DEPOT COMPANIES.

[Police Court of Columbus, 1900.]

* STATE OF OHIO v. GEORGE BROWN.

MAY GIVE TRANSFER COMPANY EXCLUSIVE PRIVILEGES.

A Union Depot Company has the right to give to a transfer company the exclusive use of depot grounds, for standing its vehicles and soliciting customers thereon, and to exclude therefrom all others engaged in a like business, excepting only for the purpose of delivering passengers or of calling for persons who have previously engaged them, notwithstanding the provisions of the anti-trust law. (Adopted as law laid down in *Snyder v. Union Depot Co.*, 10 C. D., 000.)

EARNHART, J.

In *Snyder et al. v. Union Depot Company*, the circuit court of Franklin county, Ohio, 10 Circ. Dec., 000, in its opinion says:

"The Union Depot Company has given to the Columbus Transfer Company the exclusive privilege of standing its vehicles in the depot upon the concourse or driveway from High Street to the waiting rooms, and of soliciting customers, and excludes therefrom all others engaged in like business, excepting only for the purpose of delivering passengers or of calling for persons who have previously engaged them."

With this issue then and there squarely before them, as it is here and now before this court, the circuit court found as shown by the entry in the case that,

"The Union Depot Company has the right to give to the Columbus Transfer Company the exclusive privilege of standing its vehicles in the Union Depot of said defendant (The Union Depot Co.) upon the con-

* Motion in Supreme Court for leave to file petition in error to the judgment of the police court in this case was overruled, thus affirming the circuit court in *Snyder v. Union Depot Co.*, 10 Circ. Dec., 647, on which the decision of the police court in this case was based. For decision of common pleas, *contra*, in *Snyder v. Union Depot Co.*, see 9 Dec., 63.)

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course or driveway from High Street to the waiting rooms and of soliciting customers thereon and to exclude therefrom all others engaged in a like business excepting only for the purpose of delivering passengers or of calling for persons who have previously engaged them."

This decision is so specific that it concludes this court from investigation or the exercise of any freedom of judicial opinion upon the question. Being a subordinate court, like a sentinel, the court must pace back and forth upon the space assigned always obedient to orders from its superiors and it only to be responsible for the orders here obeyed.

It has been urged upon the court that this exclusive privilege is against the letter and spirit of the anti-trust law that took effect July 1, 1898, and that although the anti-trust law was in force at the time of the rendition of the opinion of the circuit court, that the attention of the court was not called to it, and that this omission will justify the court in disregarding the law of the case as laid down in the circuit court if this court finds the contract of the Union Depot Company with the transfer company is in violation of the anti-trust law.

The attorneys representing the hackmen in *Snyder v. Union Depot Co.*, *supra*, presented a number of authorities holding railroad companies can not give to one hack or bus company the right to use the depot grounds to the exclusion of others engaged in like business, and cited statutes like our anti-trust act and decisions under them declaring all such exclusive privileges were against public policy and void and within the inhibition of said statutory regulations.

The circuit court, notwithstanding these citations, in its opinion says: "Cases at common law, or under statutes, to determine whether railroad companies in particular instances give equal terms and facilities to different parties to whom they furnish transportation, and with whom they dealt as common carriers, have no bearing on the case at bar.

"The defendant in his business of solicitor of the patronage of passengers held no relation with the plaintiff as a common carrier, and had no right to use its station, grounds and buildings."

The court thus holds that dependently or independently of statute, the defendant has no right to ply his avocation of soliciting passengers upon the driveway, while the counsel here for the defendant by brief and argument contend that by the statute and independently of it the Union Depot Company cannot make such arbitrary and exclusive regulations.

The point the court wishes to bring to the attention of the defendant and his counsel is that even if the court would be warranted in overthrowing the decision of the circuit court because the anti-trust law of 1898 was not urged before that court, that that court did in its decision expressly have called to its attention and refer to statutory enactments as broad as the anti-trust law of 1898, and intended for a like purpose, and did disregard them and hold that they had no bearing upon the case. Having declared this, and having declared when it had before it statutory

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and common law enactments upon this very issue, "That the soliciting of the patronage of passengers held no relation to the law of common carriers," it seems to the court every avenue for discussion is closed.

The decision of the circuit court is against the law as laid down in Beach on Monopolies and Trusts and the authorities there cited. It is sweeping, radical and destructive of the claims of the defendant.

The remedy, if any, is by an appeal to the legislature or by procuring a different construction of the law by our Supreme Court.

Nor is this court permitted to review the reasonableness of the rules and regulations of the Union Depot Company now in force. In the case cited in the circuit court, the entry has this incorporated: "The Union Depot Co. had and has the power to adopt and enforce the rules and regulations, a copy of which is attached to the answer and cross-petition of said defendant and marked Exhibit B."

By admission in this case of the defendant by his counsel, as well as an inspection by the court, the rules and regulations here sought to be enforced as substantially the same as the rules and regulations designated as "Exhibit B" by the circuit court.

It follows, if the rules and regulations designated as "Exhibit B" were valid, the rules and regulations now enforced are valid, and this court is excluded from a view of these rules and regulations, but must follow the construction placed upon them by the circuit court. Being thus enclosed by a judicial wall, the court surrenders any judicial investigation of its own, and instructs the defendant to obey the mandate of the circuit court, and punishes him for violating it by taxing him \$1.00 and the costs herein, with the admonition for his own good to obey hereafter the law as heretofore declared, even although it may appear to him illegal and unjust. Both contending parties cannot win, and the decision of the circuit court upon this issue must be obeyed to settle property rights, and end strife.

August 7, 1899.

WILLS—YEAR'S SUPPORT.

[Summit Probate Court, March 26, 1900.]

IN RE ESTATE OF GEORGE WITNER, DECEASED.**PROVISION IN LIEU OF THE FIRST YEAR'S SUPPORT.**

Where, by the terms of a will, it is plainly shown to be the intention of the testator to bar his widow of the first year's support, and provision is made for her in lieu thereof, if she elects to take under the will, she is not entitled to such an allowance.

MOTION for increase of year's support.

ANDERSON, J.

This hearing is upon the application of Elizabeth Witner, widow of the decedent George Witner, for an increase of her allowance for a first year's support under sec. 6043, Rev. Stat.

In re Estate of George Witner.

The will of the decedent, which has been admitted to probate in this court provides as follows:

"Item fourth. It is hereby expressly directed, that the foregoing provisions for my said wife, shall be in lieu of any and all statutory allowances, distributive share and dower she otherwise might claim; and her acceptance under this will, shall forever bar her right to have or claim any such allowance, distributive share or dower, in and to every part of my estate."

The widow elected to take under the provisions of this will, and the question presented to the court is, whether, by so accepting, she is barred by its terms from the statutory allowance for a first year's support. If not, the appraisers having allowed but \$200.00, which the court deems inadequate, the allowance will be increased; but if, on the other hand, the provision of the will above quoted is operative, no such increase of the allowance can be made.

The decedent left no minor children under fifteen years of age, and the question is somewhat simplified by that fact. In support of her contention, the widow relies upon *Collier v. Collier*, 3 Ohio St., 369; *Bain v. Wick*, 14 Ohio St., 505 (513), and *Spangler v. Dukes*, 39 Ohio St., 642.

The right to a first year's support depends wholly upon statutory enactments. And, according to all rules of construction it must be held to be included by the expression "Statutory allowances" used in the will.

In *Bain v. Wick*, *supra*, the syllabus recites, that:

"Where W died testate as to part of his property, and intestate as to the residue, leaving a widow who elected to take under the will, Held:

"1. That such election did not bar the right of such widow to her distributive share of the personal estate not disposed of by the will.

"2. That where the appraisers neglected to set off and allow to such widow her year's support as required by the statute, and she, after the expiration of the year, dies, without having waived or relinquished her right to such allowance, the same survives to her personal representatives."

This holding amounts to a decision that, under the terms of this particular will, although the widow elected to take under it, she was not thereby barred of her first year's support; and the court in passing upon this branch of the case, on page 513, uses this language:

"It was the express duty of the appraisers to set it off to her, either in property, or money, and without regard to whether the husband died testate or intestate."

And the court cites *Collier v. Collier*, 3 Ohio St., 369.

The will of Henry Wick, which was under consideration in that case, is not recited in the opinion, but that part of it relating to the

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question at issue is set out in *Bain v. Wick*, 19 Ohio, 328 (329), and is as follows:

"I will and bequeath to my wife Hanna, at my death, \$100.00, and in lieu of dower, \$500.00, each and every year during her natural life; also, the use of my present dwelling house, in Youngs town, and the three lots adjoining and near the same, not otherwise disposed of; also, the land near the village of Youngstown, that I now occupy for meadow, pasture, etc., not otherwise disposed of; also, all my household and kitchen furniture she may want for keeping house, so long as she continues my widow, but at her death or marriage, my executors will take possession of said property, and dispose of it, as hereinafter directed; but if she chooses to get her dower as the law directs, so far as it respects her, to be void, and the residue of my will to be complied with as near as may be."

It will be seen from the provisions of this will, that the testator did not intend to bar his widow of the statutory provision for her first year's support, for he has used no language which can be said to amount to a declaration of any such intention.

This decision, then, does not materially help us in arriving at any conclusion upon the question at bar. But it is said, that if the decision just considered does not settle the question, the cases of *Spangler v. Dukes*, and *Collier, v. Collier*, *subra*, are conclusive.

The case of *Spangler v. Dukes*, *subra*, was a jointure and a post nuptial settlement, by which it was claimed that dower, distributive share and statutory allowance were barred. In considering this case it is to be remembered that, when the marital rights are once fixed, the power of the husband to destroy or abridge the rights of his wife in his property, by any contract between the parties, is very much restricted by the general policy of our laws. 49 Mo., 546; 19 Pick., 167.

Again, from a careful perusal of the case, it is plainly apparent that the main contest related to dower and distributive share. Nowhere in the brief of counsel or the opinion of the court, is any reference made to statutory provisions on this subject of first year's support, and court, at the close of the opinion, uses language which shows that the question of a first year's support was not the main issue in the case to say the least of it. This is the brief announcement, (p. 650)upon this proposition:

"Something has been said as to her returning also, the amount she has received as widow for her first year's support.

Under *Collier v. Collier*, 8 Ohio St., 369, she is entitled to this allowance, notwithstanding this provision was in full of all claims against said estate."

Perhaps "Something" was said but the faint whisper was scarcely audible to the court.

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It may be a matter of great presumption, for a lower court to undertake to put a different construction upon the statute, in view of such language as this from the court of last resort in the state; but this court is so clearly of the opinion that *Collier v. Collier, supra*, is not applicable to our present statute, and that *Spangler v. Dukes, supra*, was not properly presented to the court, that it must be done. Moreover, in *Spangler v. Dukes*, the court was considering a post-nuptial contract and not a will. Courts are inclined to regard such contracts with disfavor, because of the possible influence of the husband; but there can be no such influence in case of a provision made by will.

It would seem that the decisions, made since the announcement of the opinion in *Collier v. Collier, supra*, have failed to take into consideration the provisions of the statute under consideration in that case, and the amendment enacted in 1852, which is substantially the statute of to-day. And this difficulty arises, probably, from the fact that the *Collier* case was decided by Judge Ranney in 1854, when the statutes as they are now, and which were made so by the enactment of 1852, were in force.

Again, this opinion having been rendered by such an eminent jurist, it is easy and natural to assume that a decision in 1854 was upon a consideration of the statutes of that year. But he who pins his faith to such a proposition will find to his sorrow that he has reckoned without taking into account the activity of the legislature.

And an examination of *Collier v. Collier, supra*, will show, that that decision, upon this branch of the case, was based wholly upon the statute as it existed in 1851, the time of the death of the testator, James Collier, which was shortly after April 5, 1851.

The judge, in rendering the opinion of the court, refers to sections 45 and 46, of the act relating to wills, passed March 23, 1840, Swan's Stat., 998, which sections, he says, govern this case. And, it will be observed, that he grounds his decision upon the proposition, that the law having given this provision to the widow, and nowhere vested the husband with power to take it away from her, the right is therefore absolute. Sections 45 and 46, to which Judge Ranney refers, are as follows:

"If any provision be made for a widow, in the will of her husband, she shall, within six months of the probate of the will, make her election, whether she will take such provision, or be endowed of his lands; but she shall not be entitled to both, unless it plainly appears by the will, to have been the intention of the testator, that she should have such provision in addition to her dower.

"The election of the widow, to take under the will, shall be made known to the court of common pleas for the proper county, which shall be entered upon the minutes of the court; and if the widow fail to make

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such election, she shall retain her dower, and such share of the personal estate of her husband, as she would be entitled to by law, in case her husband had died intestate. If she elect to take under the will she shall be barred of her dower, and take under the will alone."

The provisions of the statute were amended by the fiftieth general assembly, being the first session under the constitution of 1851, and the amendment was made May 8, 1852. The amended sections are 43 and 44 of that act, which are as follows:

"Provision for widows.

"If any provision be made for a widow, in the will of her husband, she shall, within one year after probate of the will, make her election, whether she will take such provision, or be endowed of his land; but she shall not be entitled to both, unless it plainly appears by the will, to have been the intention of the testator that she should have such provision in addition to her dower.

"When a widow elects to take under the will.

"The election of the widow to take under the will, shall be made by her in person, in the probate court of the proper county, except as hereinafter provided; and on the application by her to take under the will, it shall be the duty of the court to explain to her the provisions of the law, her rights under it, and by will, in the event of her refusal to take under the will. The election of the widow to take under the law shall be entered upon the minutes of the court, and if the widow shall fail to make such election, she shall retain her dower, and such share of the personal estate of her husband as she would be entitled to by law, in case her husband had died intestate. If she elects to take under the will, she shall be barred of her dower and take under the will alone, provided, that said election by the widow to take under the will, shall not bar her of the right to remain in the mansion of her husband, and receive one year's allowance for the support of herself and children, as now provided by law, unless the will shall expressly otherwise direct."

The language of our present statute, sec. 5964, Rev. Stat., is almost identical with sec. 44, above quoted.

Now, what did the legislature intend to accomplish by the addition of the words, "Unless the will shall expressly otherwise direct." There can be but one inference and one answer. Where, by the language of a will, it is plainly shown to be the intention of the testator to bar his widow of a first year's support, and a provision is made for her in lieu thereof, if she elects to take under such a will, she is not entitled to a year's support. It is incumbent on the court to give some meaning to the language used, and to put such a construction upon the statutes as will give effect to every part of them.

This last clause of our present statute would have no effect at all

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under any other construction, and since there is an explicit provision in the will of the decedent, under which this widow has elected to take, it must be held that she is barred of a first year's support.

There are a number of other cases touching upon the question under consideration, but they are not of sufficient importance to require more than a brief reference.

In Watts v. Watts, 88 Ohio St., 480, 491, no provision was made in lieu of a first year's support.

Baldwin v. Broadstone, 8 Dec., 236, is a case of ante-nuptial contract, which made no provision in lieu of a year's allowance.

Garretson v. Garretson, 2 Circ. Dec., 581, is another post-nuptial contract.

Motion overruled.

EXCAVATIONS—DAMAGES—PLEADING.

[Superior Court of Cincinnati, Special Term, February, 1900.]

HENRY VOLK V. BOARD OF ED. (CINCINNATI.)**1. RIGHT SECURED BY SEC. 2676, REV. STAT.—A PROPERTY RIGHT.**

The right conferred by sec. 2676, Rev. Stat., of having the foundations and walls and buildings secured against damages resulting from excavations on adjoining property to a greater depth than nine feet, is in the nature of a property right; and, therefore, whoever causes injury to the foundation, walls or buildings of another, invades or takes a property right expressly given by statute,

2. INVASION OF PROPERTY RIGHTS BY A BOARD OF EDUCATION.

A board of education is liable for damages where by its acts there has been an invasion of the property rights of a private party, as where such board causes excavations to be made to a greater depth than nine feet, as provided in sec. 2676, Rev. Stat., and thereby causes injury to the foundations, walls or buildings of an adjoining property owner.

3. NATURE OF ACTION BASED ON SEC. 2676, REV. STAT.

An action predicated on sec. 2676, Rev. Stat., bears a very close analogy to actions brought to recover on an implied promise for the value of property unlawfully appropriated to one's use; at all events such action is not one for tort, since a liability exists without any negligent acts of omission or commission, sufficient to distinguish such a case from actions for personal injuries where no property rights were invaded and no benefits derived.

JACKSON, J.

The plaintiff by his amended petition seeks to recover from the defendant the sum of three thousand dollars on account of damages resulting to the foundation of plaintiff's house, and to the house itself, by reason of defendant's excavating on adjacent premises (for the purpose of erecting a school house) to a greater depth than twelve feet below the established grade of the street and below the foundation walls of plaintiff's house.

The petition alleges that the defendant is a body corporate and politic under the laws of Ohio, and that it is the owner in fee simple of certain real estate situated on the west side of Orchard street in the city of Cincinnati, immediately adjoining the property of plaintiff whereon

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is erected plaintiff's house; that in February, 1892, the defendant proceeded to erect a school house upon its said premises, and that for this purpose the excavation was carried down more than twelve feet below the established grade of Orchard street, and below the foundation walls of plaintiff's house. It is further alleged that the work of excavating by defendant was negligently and carelessly done, and that by reason of said neglect, and the said deep excavations the injury in question was done.

To this petition the defendant interposes a demurrer, in support of which it is claimed that the board of education as a *quasi* public corporation, and a political subdivision of the state, can not be held liable in actions of tort. In support of this proposition reliance is had largely on the cases of Commissioners v. Mighels, 7 Ohio St., 109, and Finch v. Board of Ed., 30 Ohio St., 37.

In the first of these cases it was held that the commissioners of a county are not liable in their *quasi* corporate capacity to an action for damages for personal injuries to a private party caused by their negligence in the discharge of their official functions. In this case the party seeking to recover was injured by reason of the unsafe condition of the stairway of the court house then being constructed in Cincinnati. The court held in effect that the commissioners of a county were a *quasi* corporate body, and not a corporate body in the proper sense of the term; that counties are local subdivisions of a state created by the state without the consent or concurrent action of the people who inhabit them, and that in this respect they differ very materially from municipal corporations. Consequently it was held that the liability of counties to be sued must be limited to such matters as arose from or were embraced in the express powers granted to them by the state. On this line of reasoning it was held that counties were not liable for personal injuries caused by the negligence of the agents of the commissioners.

In the later case of Finch v. Board of Ed., *supra* the same reasoning was adopted and the same rule laid down with reference to a board of education. It was also assigned as reason for the holding in the Toledo case that the power of the board of education for raising money by taxation was limited to certain specified purposes, viz.: for the erection and maintenance of school houses, etc., and that "there were no possible means by which defendant, if liable for a tort, could provide a fund out of which to satisfy a judgment against it."

It was, however, there stated that within the limits of its express or implied grants, the board was capable of contracting, and that it could "be sued to enforce its contracts, and be compelled, by legal powers, to comply with all its legal obligations."

These cases were cited with approval in Dunn v. Agricultural Society, 46 Ohio St., 93. But in these cases it will be noted that the actions were for the recovery of damages for personal injuries resulting

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from negligent acts, and the question is now presented whether or not this rule applies when damages are sought to be recovered on account of an invasion of the property rights of a private party. I find no decision by any of the Ohio courts on this subject, but the question was passed on by the United States circuit court for the Northern District of Ohio in *May v. Logan Co.*, 30 Fed. Rep., 258. It was there held that the county was liable in damages for the appropriation of certain patent rights of plaintiff for improvements in county jails, notwithstanding the action was founded on tort and not on contract or assumpsit. The court there said:

"Under the authority conferred upon them (counties) by law, it is perfectly clear that the county commissioners of Logan county could have contracted for the use of said patented apparatus, and that said contract would have been binding upon and enforceable against said county. But, instead of contracting for its use, the commissioners wrongfully and without license appropriate this patented apparatus, and the county now disputes its liability on the ground that it had no authority so to appropriate it, and because the remedy prescribed by congress is an action on the case, which, at common law, implied or involved a tort, for which counties, as political sub-divisions of the state or *quasi* corporations, could not be held responsible."

Further, it was said on page 259:

"The case of *Commissioners v. Mighels*, 7 Ohio St., 109, belongs to this class of authorities which exempts counties from liability for mere personal injuries arising from negligent acts of omission or commission on the part of their agents. It has no application whatever to cases like the present, in which the property of another has been either wilfully or negligently appropriated by such agents to the use and benefit of the county. * * * To allow this would violate the plainest dictates of justice and common honesty."

Further speaking of the case of *Commissioners v. Mighels*, *supra*, the court said, page 259:

"It fails to recognize the distinction now well settled, between the liability of a county for the negligence of its officers, causing mere injury to another without advantage to itself, and those wrongful acts which result in benefit to the county as well as damage and loss to the injured party."

Now, by sec. 3971, Rev. Stat., it is proved that, "The boards of education of all school districts * * * shall be, and they are hereby declared to be bodies politic and corporate, and, as such, capable of suing and being sued, contracting and being contracted with, acquiring, holding, possessing and disposing of property, both real and personal," etc.

By sec. 3987, Rev. Stat., "The board of education of any district is empowered to build, enlarge, repair and furnish the necessary school

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houses," etc.; and it is manifest that the boards must have at their disposal moneys for the purpose of erecting necessary school houses, and that they can make contracts with reference to building such school-houses, which contracts could be enforced at law.

Section 2676, Rev. Stat., provides: "If the owner or possessor of any lot or land, in any city or village, digs, or causes to be dug, any cellar, pit, vault, or excavation, to a greater depth than nine feet below the curb of the street on which such lot or land abuts, or, if there be no curb, below the surface of the adjoining lots, and by such excavation, causes any damage to any wall, house or other building, upon the lots adjoining thereto, such owner or possessor shall be liable, in a civil action, to the party injured, to the full amount of the damage aforesaid."

This section gives the party whose property has been thus injured a right to recover independent of any acts of negligence on the part of those doing or causing the excavation, and in effect confers upon property owners certain rights which were not possessed by them at common law. The right thus conferred by the statute, namely, that of having the foundations and walls and buildings secured against damage by reason of excavations on adjoining property to a greater depth than nine feet is in the nature of a property right. Therefore, whoever thus causes injury to the foundation, walls or buildings of another invades or takes a property right expressly given by statute. It is clear that the defendant might have contracted with the plaintiff so that it might obtain the right to excavate to the depth in question, and that it would have been liable on such contract for the liquidated damages stipulated for. If instead of making such contract it violates the statute, and thus in effect appropriates plaintiff's property rights and by so doing reaps a benefit therefrom, it should be held liable therefor.

It may be that in such case the action would not be in assumpsit to recover on the implied promise for property wrongfully taken, but nevertheless the action would be to recover for the violation of a right given by a statute and concerning which the parties might have made a contract enforceable at law. To say the least, an action predicated on sec. 2676, Rev. Stat., bears a very close analogy to actions brought to recover on an implied promise for the value of property unlawfully appropriated to one's use. At all events the action is not one for tort, since a liability exists without any negligent acts of omission or commission, and this fact is sufficient to distinguish this case from the cases relied on by defendant and heretofore cited when the actions were for damages for personal injuries, and where no property rights were invaded and no benefits derived from the acts complained of.

For the purpose of this demurrer the allegations of negligence in the petition may be disregarded, since they are not necessary to sustain plaintiff's right to recover.

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The denouncer must be overruled.

Shay & Cogan, for plaintiff.

Corporation Counsel, for defendant.

BILL OF INTERPLEADER.

[Superior Court of Cincinnati, Special Term, February, 1900.]

CONNECTICUT MUTUAL LIFE INS. CO. v. LUCY E. LEA, ET AL.

1. PROVINCE OF A BILL OF INTERPLEADER.

The true province of a bill of interpleader under the equity practice, is to set forth substantially the general nature of the claims asserted by two parties on which each seeks to recover from the defendant on the same debt or obligation.

2. FOUNDATION FOR BILL OF INTERPLEADER.

The true foundation for such a bill is that two parties have presented to the plaintiff claims for the same debt or obligation, which claims are antagonistic to each other, and that the plaintiff is unable to determine which claim, as a matter of fact, is, and which is not well founded. And unless such claims have actually been presented, the plaintiff has no right to ask the parties to interplead.

3. NO RIGHT TO AN INTERPLEADER—WHEN.

It is not the duty of the plaintiff in such case to determine for himself which claim is sustained in *fact*, but if either claim is not well found in *law* there is no right to an interpleader. Thus if the plaintiff has become obligated to either party by an independent undertaking so that he does not stand perfectly indifferent between them, he cannot maintain an interpleader.

4. PETITION IN THE NATURE OF AN EQUITABLE INTERPLEADER.

When such conflicting claims have been presented it is the duty of the plaintiff, in asking for an interpleader, to set forth generally in his petition the nature of the claims that have been made to him, so that the court can determine from the petition itself if an interpleader is proper.

JACKSON, J.

The plaintiff files a petition in the nature of an equitable interpleader, alleging that on January 30, 1879, it issued a policy of insurance on the life of one Edward T. Lea for \$4,608, and that said Edward T. Lea died on October 5, 1899; and that thereupon the said defendants, Lucy E. Lea, and Mary Lea Woodruff, each duly furnished proofs of loss under said policy to the plaintiff, and each claims to own said policy, and that the plaintiff is ignorant of the respective rights of said defendants, and has no interest in the policy or the money due thereunder. There is also the necessary allegation that the suit is brought without collusion with either of the defendants. The plaintiff therefore asks that the defendants be compelled to interplead together concerning their claims to said policy and the money due thereunder.

The defendant Lucy E. Lea, moves to have the petition made more definite and certain by requiring the plaintiff to set out the name of the beneficiary named in the policy, and by alleging the nature, character and foundation of the claim to the policy relied on by Mary Lea Woodruff.

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I am satisfied that the true province of a bill of interpleader under the equity practice is to set forth substantially the general nature of the claims asserted by two parties on which each seeks to recover from the defendant on the same debt or obligation. The true foundation for such a bill is that two parties have presented to the plaintiff claims for the same debt or obligation, which claims are antagonistic to each other, and that the plaintiff is unable to determine which claim, as a matter of fact, is, and which is not well founded. Unless such claims have actually been presented to him he has no right to ask the parties to interplead. It is not the duty of the plaintiff in such case to determine for himself which claim is sustained in fact, but if either claim is not well founded in law there is no right to an interpleader.

Therefore, when such conflicting claims have been presented, it is the duty of the plaintiff, in asking for an interpleader, to set forth generally in his petition the nature of the claims that have been made to him, so that the court can determine from the petition itself if an interpleader is proper.

There are many reasons why this is the rule; one reason being that if the plaintiff has become obligated to either of the parties by an independent undertaking so that he does not stand perfectly indifferent as between the parties, he cannot maintain an interpleader. Now, as the plaintiff issued this policy it must certainly know the beneficiary named therein, and if any other person than the beneficiary named makes claim, the plaintiff must certainly know the general nature of that claim; and it is the duty of the plaintiff to set forth these facts so that the court may see if a proper case exists for an interpleader. If no proper case is made to appear from the petition, by a statement of the claims as presented to plaintiff, then the parties have a right to pursue their independent actions at law.

The motion will be granted.

Kittreage & Wilby, for motion.

Stephens & Lincoln, contra.

GAMBLING TRANSACTIONS.

[Superior Court of Cincinnati, Special Term, 1900.]

P. J. GOODHART & Co. v. HENRY RASTERT.

1. INTENTION TO GAMBLE MUST BE MUTUAL.

To constitute a gambling transaction, both parties to the contract must intend to gamble.

2. INTENT DETERMINED FROM ALL THE EVIDENCE.

The intent of a party to the contract need not necessarily be determined by his own testimony, but may be determined from all the evidence, direct and circumstantial.

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3. TEST TO DETERMINE CHARACTER OF TRANSACTION.

The sole test by which the legality of a sale (relating to stocks and bonds in case at bar) is determined is: was the sale *bona fide*? Did the parties really contemplate a sale on the one side and a purchase on the other? If they did the sale is legal, without regard to the question whether the purchaser bought for speculation or the seller originally purchased the property for the same purpose.

4. DUTY TO DISREGARD MERE FORMS.

Where the contract is a mere form to evade the law, and there is no *bona fide* sale or purchase, it is the duty of the jury to tear away the disguises and treat the transaction as it is.

5. COMPOUND INTEREST—RULE AS TO ALLOWANCE.

Interest upon interest, or compounding interest, as a general rule, is against the policy of the law. But interest may be allowed upon interest, as where there is a settlement of accounts between the parties after interest has become due, or there has been an agreement for that purpose after the execution of the original contract, or upon agreed rests.

6. ACCOUNT RENDERED—ACCOUNT STATED.

An account rendered by one person to another and not objected to within a reasonable time, has the force of an account stated, and will be taken as correct, until shown to be incorrect, except where, when the account was sent, the parties had already come to a disagreement and assent from silence could not be reasonably inferred.

CHARGE to the jury.**SMITH, J.**

The plaintiffs in this case, P. J. Goodhart & Co., seek to recover, for a first cause of action, the sum of \$8,655.25, with interest from August 18, 1896, the balance of an account which they claim is due them for stocks and bonds actually purchased and sold for the account of the defendant, Henry Rastert, at his request, and for moneys advanced by the plaintiffs for his use and at his request; and they allege that demand has been made upon defendant for payment of the same, which has been refused.

For a second cause of action they claim indebtedness on a promissory note for \$2,000, with interest from August 18, 1896.

The total amount, therefore, claimed is \$5,655.25, with six per cent. interest from August 18, 1896.

The defendant sets up three defenses:

1. He denies that under any circumstances he owes the amount claimed;

2. He claims that the transactions which gave rise to the account and note were illegal, gambling transactions, and, therefore, not the basis of a recovery against him;

3. For the same reason, viz., that the transactions were gambling transactions, he seeks to recover back a large amount, over \$100,000, which he claims to have paid Goodhart & Co., in these transactions, and,

4. He claims by reason of the failure of Goodhart & Co., to sell certain stocks and bonds belonging to him on July 11, 1896, he lost \$6,916.50, an amount which it is claimed would offset the claim of Good-

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hart & Co., on both the account and note, and, in addition, would entitle him to a judgment against Goodhart & Co., for \$1,305.15.

The first and most important question which will occupy your attention is: Were the transactions between Goodhart & Co. and Rastert legitimate and their obligations enforceable in the courts, or were they what is known as wagering or gambling transactions, and, therefore, illegal?

As the transactions here were with reference to shares of stock in corporations, it is important for you to remember, or to know, if you are not familiar with the subject, that the interest which parties have in corporations is represented by certificates which are printed on paper, and which, under the seal of the corporation and countersigned by the president and secretary of the corporation, are evidence to all persons that the holders of the certificates are the owners of the shares in the corporation which are declared in the certificates. When shares of stock are sold the transfer is made by a delivery of these certificates (with the endorsement of the seller on the back) to the purchaser, and such delivery transfers the title to the same. Thus, by the transfer and delivery of such certificates, millions of dollars of interest in the corporations of the country are daily transferred from one person to another; and such transfer and delivery changes the title to the interest transferred as completely, for instance, as the title to a horse sold is transferred by the seller putting him in the stable of the purchaser, or as the title of any articles is transferred by delivering it into the hands of the purchaser.

You are all familiar with the ordinary sale of property by one person to another, where the purchaser intends to use the property. It is, of course, not necessary to say that such a transaction is legitimate.

You are also familiar with the case of a person purchasing property, not to use, but for the purpose of selling it again, if possible, at a profit. An illustration of this class of purchases is best seen in those made by merchants who buy goods for the purpose of selling them again.

In all such purchases there necessarily enters an element of speculation, because it cannot be told with certainty always that the purchaser will be able to sell at a profit. The mere fact, therefore, that a purchaser buys for speculation does not make a transaction illegitimate. If it did there would be an end to all commerce and business. Nor is a contract of sale illegal because the seller, at the time of the contract of sale, does not own the property he contracts to sell and has not made a contract with some one else to deliver to him. Nor is a contract illegal because the delivery is to take place at some time in the future.

The sole test by which the legality of the sale is determined is: Was the sale a *bona fide* sale? Did the parties really contemplate a sale on the one side and a purchase on the other? If they did, the sale is legal, and it is entirely aside from the question whether the purchaser

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buys from the seller because he intends to speculate by reselling, or whether the seller originally purchased the property for the same reason.

While speculation by the *bona fide* purchase and sale of property is valid, yet where two parties come together, either by themselves or their agents, and say, in effect: "Let us not bother about actually selling and buying any kind of property, but let us simply agree that if the price goes up above the market price of today I can call on you at any time to pay me the difference, and if it goes down you can call on me to pay you the difference," or the agreement may be *vice versa*. These transactions the law condemns as illegal; because they are nothing more than betting on the event of the rise or fall of the market, and are, in effect, as much betting transaction as betting on a horse race or any other event whose occurrence in the future is uncertain. And "no matter what the form of the contract, no matter how many colorings of reality and of genuine dealing are thrown about the transaction, if, piercing all these disguises, the jury see that these forms are mere shams and that there was no actual dealing in the stock itself, but that the forms were adopted as a mere semblance, to deceive and evade the law, it is the duty of the jury to tear away the disguises and treat the transaction as it is."

But a man can not bet or gamble with himself. To constitute a transaction, a gambling transaction, both parties must intend to gamble. The unlawful intent must be mutual, and not confined to one party.

If, therefore, either Rastert or Goodhart & Co., intended that there should be *bona fide* purchases and sales of stock, the transactions are legal, and an intent of the other contracting party that the purchases and sales should not be *bona fide*, but mere forms, would not make the transaction illegal.

The intent of any party, however, is not to be determined necessarily by his testimony solely, but may be determined from all the evidence in the case, both direct and circumstantial, and may be such, in your judgment, as to completely contradict and disprove his oral statement.

There probably never has been a time in the history of the world when men did not sometimes act through others. But with the complex business of modern commerce, dealing through agents becomes a necessity in probably the great majority of business transactions. Whenever a man acts through an agent authorized to act for him, the act of the agent is his act; and a delivery of property to an agent authorized to receive it is the same as a delivery to the principal; and a loan to or sale of stock by an agent authorized to borrow or sell is the act of the principal.

But, of course, to bind the principal, the agent must act within his authority. If he transcends his authority the principal is not bound.

With these general statements of the law I come now to their application to the case at bar.

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The defendant, Rastert, claims that at first, for a short period of time, the transactions were *bona fide*, but that subsequently they developed into mere gambling transactions.

On the other hand, Goodhart & Co., claim that the transactions were of the same character from the beginning, and that the only difference between them was that after the short period of time just referred to Rastert requested that the stock should not be sent from New York to Cincinnati and delivered to him, but should be held by them in New York, by their representatives there, for him and subject to his order.

What the facts in this case are must be determined by you from the evidence.

If, whenever Rastert—ordered Goodhart & Co., to buy stock for him, they, in good faith, actually purchased the stock for him and held it subject to his order, requiring him to make an advance to them of ten per cent. of its cost, although they would be entitled to hold possession of the stock to secure the lien which they would have upon it for Rastert's unpaid indebtedness to them, yet the property of the stock, that is, the ownership of it would be in Rastert. They would hold it as his agent with the right to have their lien for any unpaid balance satisfied before they could be compelled to turn it over to him. Such a transaction is a perfectly legitimate transaction. It would be similar to an order, for instance, given by A to B to buy a horse for him for \$100. A giving B \$10 with which to make a part payment, the understanding between A and B being that B should advance the balance. When B purchases the horse, paying \$100 for it, the horse belongs to A, although B would have the right to keep possession of it until A paid him the \$90. Whenever A paid the \$90 he could demand the possession.

It does not follow that a man does not own property because he may not get possession of it until he pays certain liens or charges that are against it.

It, however, when Rastert gave Goodhart & Co. an order to buy stock for him, they both understood that no stock was to be purchased, but that there should be a settlement of differences in prices, as if it had been bought and afterwards sold for Rastert, the transaction would be illegal.

Or, if they both intended the transaction to be merely a wager on the price of stock, but intended to evade the law by having Goodhart & Co., to really purchase stock as if purchasing for Rastert, but the understanding was that the stock was to be the stock of Goodhart & Co., and that Rastert could not, by the payment of the cost price with interest and commission, have compelled its delivery to him, then the transaction would be illegal and a wager within the meaning of the law. In such a case the transaction would be legal in form only and not so in reality.

By the application of the principles of *bona fides*, or good faith, to

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the transactions of sale you will determine whether they are legal or illegal.

If, when Rastert ordered Goodhart & Co. to sell certain stock for him, which stock Rastert did not own, but which, in good faith, Goodhart & Co. borrowed for him, paying to the lender their own money for it and then selling it in the market for Rastert's account, the transaction is a legitimate one and is upheld by the law.

But if there was no actual borrowing or sale of stock, or even if there were, if both parties understood the borrowing and sale to be mere forms intended to evade the law, and the real intention of both parties was that the stock should never be the property of Rastert and that he could not, by the payment of the charges against it, enforce its delivery to him, the transaction would be a wager and illegal.

If you find the transactions between Rastert and Goodhart & Co. were illegal, then Goodhart & Co. are not entitled to recover anything, either on the account or the promissory note set out in the petition; but, on the contrary, Rastert would be entitled, by reason of the provisions of our statute relating to wagers, to recover, on his cross-petition, from Goodhart & Co. whatever money he had paid to Goodhart & Co. for a period of eighteen months prior to the filing of the cross-petition, with six per cent. interest on the same to March 5, 1900, the first day of this term, deducting, if the evidence shows it, any profits that he may have made in the transactions during such period of time. But for any money paid prior to such eighteen months there would be no right of recovery.

If, however, you find the transactions were legal, you will determine whether the account as stated in the petition is correct, and whether the amount claimed to be due on the note is correct.

The amount claimed by Goodhart & Co., to be due on the account and on the note is disputed by Rastert (even if it be conceded that the transactions were legal), on the ground of excessive interest charges, because the interest has been compounded; that is, interest is charged on interest.

Interest upon interest, or compounding interest, as a general rule is against the policy of the law. But interest may be allowed upon interest—as where there is a settlement of accounts between the parties after interest has become due, or there has been an agreement for that purpose after the execution of the original contract, or upon agreed rests. A party may demand the interest due him, and if not paid it may, by agreement, be turned into principal.

It is contended in this case, by Goodhart & Co., that, by agreement between the parties, they were to render their account to Rastert monthly, and that these monthly accounts included interest which had accumulated during the month; and that at the end of each month the account was due for settlement; and that, by agreement, the unsettled amount was the beginning of the account for the next month.

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If you find that this was the understanding of the parties, then the claim made by Rastert that interest has been compounded falls to the ground.

On the other hand, if you find that there was no such understanding or agreement, then there would be no right to compound interest.

But in this connection, as well as where I have previously referred to an agreement or understanding between the parties, it is not necessary that it must be proven that the parties by express language expressed the agreement or understanding. The agreement or understanding may be inferred or implied from their language or from the conduct of the parties. For acts often speak as loud as words. It is said that sometimes they speak louder.

So, if an account is rendered by one person to another and is not objected to within a reasonable time, it has the force of an account stated. That is to say, it will be taken as correct until shown by the party to whom it was rendered to be incorrect. But this rule, of course, does not apply if, when the account was sent, the parties had already come to a disagreement, and, therefore, assent from silence could not reasonably be inferred.

But if the defendant, Rastert, fails to satisfy you that these transactions were wagering or gambling transactions, then he claims that Goodhart & Co. are not entitled to recover on the account and note set out in the petition, for the reason that Goodhart & Co. failed to sell certain shares of Chicago Gas, Chicago, Burlington & Quincy Railroad stock and Philadelphia and Reading income bonds, and did not sell them until a later date than that at which they were ordered to sell them, and that the amount which would have been realized was \$31,054 and the amount actually realized was \$24,187.50, and that the difference not only equals the amount sued on in the petition, but leaves a balance of \$1,305.15 in Rastert's favor, for which he asks judgment.

It is for you to determine, on the evidence, whether this contention has been supported by the evidence.

The burden of proof is upon the plaintiff, Goodhart & Co., to show you, by a preponderance of the testimony, that they conducted the transactions set out in the petition on behalf of the defendant, Rastert, made the purchases, sales and loans claimed by them to have been made, and that there is due them the amount set out in their account and on their note.

On the other hand, the contention of the defendant, Rastert, that these transactions were illegal must be made out by him by a preponderance of the testimony, and so the claim to recover money from Goodhart & Co., either because the transactions were gambling transactions, or because they failed to sell stock held by them for him when he ordered them to sell, must be made out by a preponderance of the testimony.

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I have frequently instructed you as to what is meant by the preponderance of testimony, viz., that it means, not that one side has more witnesses than another, but that, taking all the testimony into consideration, both direct and circumstantial, the testimony of one side outweighs that of another.

So I have frequently said that, while I instruct you as to the rules of law that govern you, you are the judges of the credibility of the witnesses, and it is for you to determine, under all the evidence, what the facts of the case are, taking into consideration, in the determination of the credibility of the witnesses, their self-interest, if any, appearance, manner of testifying, bias, and each and every circumstance in evidence which, in your judgment, throws light on the question.

You need not be reminded that this case is to be determined by the rules of law and the evidence in the case, and you are not to permit yourselves, by sympathy, prejudice, or any other motive, to be deflected from the determination of this case on that basis. If you do you not only do injustice, but you violate your oath of office by which you declared that you would well and truly try this case and a true verdict render according to the law and the evidence.

STREET ASSESSMENTS—LIENS.

[Hamilton Common Pleas, January Term, 1900.]

E. R. DONOHUE ET AL., RECEIVER, V. JOHN G. BROTHERTON ET AL.

1. LEGISLATION REQUIRED TO LEGALLY IMPROVE OR REPAIR.

A city council cannot legally order the improvement or repair of a street, and, after the improvement or repairs are made, assess its expense upon property owners. The determination to make the improvement or repairs and the determination to charge owners with the cost, must both precede the actual making of the improvement.

2. ACTS CREATING ESTOPPEL AGAINST PROPERTY OWNERS.

Property owners by signing a petition for a street improvement, and actively participating in the promotion of a scheme of legislation, whereby the municipal corporation, in paying the expense of the improvement, parted with its money raised by an issue of municipal bonds and assessed the same per front foot on the abutting lots, are estopped from availing themselves of the illegality of such proceedings and denying the validity of the assessment.

3. WHEN TAXES AND ASSESSMENTS BECOME A FIRST AND BEST LIEN.

Persons dealing with, or lending money upon real estate must be deemed to do so with a knowledge of the paramount right of taxation and assessment, and, when such right is exercised according to law, taxes and assessments so levied become a lien prior to any and all others.

4. EXISTING IMPROVEMENT ILLEGALLY MADE—MORTGAGE.

After an improvement has been made, without a determination to charge its cost upon abutting lots and without legislation to that end, abutting owners, after the attaching of a mortgage lien, cannot, by contract or by acts creating estoppel, charge the lots with an assessment lien which will have priority over the mortgage.

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5. PETITION FOR IMPROVEMENT NOT AN INTERFERENCE WITH LIENHOLDERS.

The theory upon which the governmental right of assessment rests, is that there is supposed to be as much added to the value of the property by the special benefit of the improvement as the assessment levied and hence the security of the lienholder remains the same. A petition for an improvement is not, therefore, an interference with vested rights of existing lienholders.

JELKE, J.

In the month of September, 1890, the Elsmere Syndicate on its own credit and at its own expense improved Floral avenue, from Hudson avenue to the south corporation line of the village of Norwood. On February 27, 1891, the trustees of the Elsmere Syndicate borrowed \$10,000 from the Emperor Building & Loan Company, and gave a mortgage on ten lots to secure said loan, which mortgage was recorded February 28, 1891. This court has found that there is still due on said mortgage \$7,778.65. On September 14, 1891, these ten mortgaged lots and others were annexed to the village of Norwood.

Subsequent to said annexation, on December 7, 1891, the trustees of the Elsmere Syndicate being indebted to the contractors for the said improvement of Floral avenue, and desiring the village of Norwood to raise the money by the sale of bonds and to pay said contractors, and the council of said village being willing that the said improvement be paid for and assessed on the abutting property in the same manner as the improvement of other streets in the municipality, proceeded as follows:

The trustees of the Elsmere Syndicate and all other owners of lots abutting on Floral avenue joined in a petition to the council of the village of Norwood, asking it to improve Floral avenue from Hudson avenue to the south corporation line in the way it was actually improved, the improvement in contemplation of the petitioners and the council not being a new one, but the one and the same for fifteen months prior thereto completed and existing, the signers agreeing to pay the assessment therefor on their lots.

In pursuance of said petition, on June 6, 1892, an ordinance was passed by the village of Norwood to so improve said avenue.

On August 4, 1892, in pursuance of said ordinance, a contract for such improvement of said avenue was duly entered into with John G. Brotherton.

On September 5, 1892, an ordinance to assess the ten lots and others abutting on said improvement, and for the issue and sale of bonds of the village of Norwood to pay for said improvement, was passed by the village of Norwood.

The bonds of the village of Norwood, in accordance with said ordinance, were duly issued and sold and the proceeds turned over to John G. Brotherton, the contractor with said village, who used said proceeds to pay the balance due from the trustees of the Elsmere Syndicate to the original contractors for said work. Both the village council and the

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Elsmere Syndicate knew that in reality no work was to be done by the village, but that such work had already been done and completed by the trustees of the Elsmere Syndicate, and these proceedings were for the purpose of raising money to pay the balance due for said completed improvement. The Emperor Building & Loan Company did not authorize said petition for improvement or the proceedings of the village in pursuance thereof, neither did they have any knowledge of them or consent to or ratify them.

The question now is raised upon sale of the said ten mortgaged lots by proceedings in foreclosure, and on distribution of the proceeds arising therefrom, whether the mortgage lien of the Emperor Building & Loan Company or the assessment lien of the village of Norwood has priority.

Were it not for estoppel, the assessment levied by the village of Norwood would be clearly invalid.

In Folz v. Cincinnati, 2 Handy, 261, Gholson, J., said:

"The city council can not order an improvement or repair to be made to a street, and, after the improvement is made, assess its expense upon the property owners. The determination to make the improvement, and the determination to charge the owners with its cost, must both precede the actual making of the improvement." Also see pages 262-264 of the opinion.

The court is of opinion, however, that the owners of the fee of the lots abutting on Floral avenue by their signatures to the petition, and by active participation in the promotion of the scheme of legislation, whereby the village of Norwood, in paying the unpaid portion of the expense of the improvement, parted with its money raised by an issue of municipal bonds and assessed the same per front foot on the abutting lots, are estopped from availing themselves of the illegality of such proceedings and denying the validity of the assessment.

I concur in the opinion of Spiegel, J., of this court, who announced the same conclusion in Cleneay v. Norwood, cause No. 112475, as to this identical improvement and assessment.

But the question here presented is not as between the village and the owners, but between the village and *bona fide* lienholders who acquired their liens after the improvement was made and before the assessment scheme was inaugurated, and who loaned their money on lots abutting on this improvement, but so far as appeared of record or as they actually new free of assessment lien therefore.

Everybody dealing with or lending money upon real estate must be deemed to do so with a knowledge of the paramount right of government of taxation and assessment, and when such right is exercised according to law, taxes and assessments so levied become a first and best lien prior and preferable to any and all others.

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Owners of property have the right to sign petitions representing two-thirds, as provided for in sec. 2267, Rev. Stat, or three-fourths, as provided for in sec. 2272, Rev. Stat, for the purpose of conferring jurisdiction on a municipal council to legislate for an improvement and an assessment, and such signatures are not an interference with the vested rights of existing lienholders.

The theory upon which the governmental right rests is that there is supposed to be as much added to the value of the property by the special benefit of the improvement as the assessment levied, and hence the security of the lienholder remains the same.

"An assessment is a local imposition with reference to special benefit derived from the expenditure." Raymond v. Cleveland, 42 Ohio St., 522.

"If a sum is exacted in any instance, in excess of the value of the special benefits conferred, it is, as to such excess, in that instance, private property unjustly taken for public use without compensation to the owner." Chamberlain v. Cleveland, 34 Ohio St., 551, 562.

See also State ex rel. Eastman v. Commissioners, 17 Ohio St., 559.

In the case at bar, after the Emperor Building & Loan Company had acquired its lien, no special benefit was conferred upon this property wherefore as against this company it should be subjected to a lien.

The validity of the assessment as against the owners does not rest upon municipal power legally exercised, but rather upon contract to which both by their signatures and by estoppel *in pais* the abutting owners bound themselves. The village council knew it was proceeding illegally in all the steps of this legislative scheme, but were willing and felt justified in doing so because they had the property owners bound by their signatures to the petition and by estoppel.

The council had no such hold upon the mortgagee, the Emperor Building & Loan Company.

The court is of opinion that the property owner could not by contract entered into by signing a petition or by estoppel by participation in a line of conduct, and without the duly and legally exercised governmental power of assessment by the municipality, charge his lots with an assessment lien which would have priority over existing encumbrances.

As between the mortgage of the Emperor Building & Loan Company and the assessment lien of the village of Norwood the mortgage has priority.

Donohue v. Spencer, No. 114249; same opinion.

Peaslee v. Brotherton, No. 112225; same opinion.

Gideon C. Wilson and C. Hammond Avery, for building association.

Wm. E. Bundy and Wm. R. Collins, for village of Norwood.

CONTRACTS—DAMAGES—INTERPLEADER.

[Superior Court of Cincinnati, Special Term, 1900.]

BLOCK-POLLAK IRON CO. V. CINCINNATI CORRUGATING IRON CO. ET AL.**1. RESPONSIBILITY FOR FURNISHING UNSUITABLE MATERIAL.**

A corrugating iron company by contracting to furnish such material for a building becomes liable for damages, occasioned by the blowing off of a roof, resulting from furnishing unsuitable and insufficient cleats and rivets.

2. DAMAGES FOR DELAY—MEASURE OF—

A corrugating iron company having contracted to furnish material for a building on a certain date is liable in damages for delay; and the measure of such damages includes the wages of men employed by the contractor and whose enforced idleness was occasioned by the delay in furnishing material.

3. COSTS OF AN INTERPLEADER.

The costs of interpleader, brought by the company for whom the building was being erected, to determine to whom a balance due should be paid, the money being claimed by the contractor and the corrugating iron company, should, under the facts stated, be borne by the corrugating iron company.

JACKSON, J.

On October 1, 1897, the Block-Pollak Iron Company filed in this court a petition of interpleader, wherein it alleged in substance that it had entered into a contract with the Cincinnati Corrugating Iron Company for the erection of certain forge works at Carthage, Ohio; that it had paid the full amount owing on said contract, except the sum of \$552, and that this sum was demanded by the said Cincinnati Corrugating Iron Company, and by one Elmer E. Locke, the sub-contractor, and also by numerous workmen who had duly filed mechanics' liens. The plaintiff, therefore, asked to be permitted to pay this sum into court and to be discharged from all liability to each and all of the defendants. An order, as prayed for, was accordingly made, and thereupon the different defendants came in and filed answers and cross-petitions setting up their claims to the fund in question.

The substance of the claim of the Cincinnati Corrugating Iron Company is, that on July 14, 1896, it entered into an agreement with R. E. Locke by which said Locke agreed to put all the corrugated iron on the buildings at Carthage, Ohio, and repaint the same on the exterior side; the same to be done according to specifications and to the entire satisfaction of A. O. Elzner, architect, and the Cincinnati Corrugating Company. In said contract, Locke agreed to wholly finish the work on or before October 22, 1896, provided the work was in such condition that he would be able to start applying the iron on or before September 22. The contract further provided that the Cincinnati Corrugating Iron Company was to furnish all cleats, rivets and paint. The Corrugating company claims that Locke failed to complete the work by October 22, or at any other time, and that it was compelled at great cost and trouble to complete the work itself. It also claims that by reason of

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negligence and unskillfulness on the part of Locke and his employes, the corrugated iron roof blew off, whereby it was compelled to furnish new corrugated iron and other materials to the value of \$400. It, therefore, seeks to recover the sum in court, and also damages against Locke.

The claim of Locke is that the corrugated iron roof blew off not by reason of any unskillful workmanship, or by reason of any fault or negligence on his part, but by reason of the insufficiency and unsuitability of the cleats and rivets (furnished by the Corrugating company) to properly hold the roof in place. That by reason of the blowing off the roof, a great deal of extra work and expense was imposed on him in replacing the same, for which he claims the Corrugating company is liable.

Locke further claims that he did substantially perform and fulfil his contract, and that the work was actually accepted by Mr. Frantz, the representative of the Corrugating company. It is not claimed that the work was ever accepted by Mr. Elzner, the architect, but Locke insists that he is not responsible for this. Because, having substantially completed the work and having had it accepted by the Corrugating company itself, Locke claims the right to recover on the contract. Locke further claims that the Corrugating company failed to deliver him material, and failed to have the work in condition for him to start applying the iron on September 22, 1896. He claims that he and a large force of workmen (who were being paid by him) were kept idle for a period of about twenty days, owing to this inexcusable failure on the part of the Corrugating company; by reason of which he claims that he was damaged in the sum of \$659. Locke, therefore, claims to recover the sum in court and also damages against the Corrugating company.

The other parties are workmen employed by Locke, who duly filed liens as workmen, and whose claims must of course depend on the validity of Locke's claim.

It is impossible for the court to attempt to summarize all of the evidence, the trial of the case having lasted over a week. I will, therefore, attempt to state only my conclusions. As to the blowing off of the corrugated roof, my conclusion is that Locke was not to blame for this. It was not the result of any unskillfulness or negligence on the part of him or his workmen, but it was caused by the fault of the Corrugating company in sending very insufficient and unsuitable cleats and rivets to hold the roof in place. It is true that Locke did not use as many of these cleats as he might have done, but Mr. Elzner, the architect, stated that this would not have altered the result. In fact, Locke complained to the Corrugating company of the insufficiency of the materials furnished, and stated that he would not be responsible for the blowing off of the roof. In short, the evidence and a personal inspection of the cleats themselves has satisfied me that the Corrugating company, and not Locke, was responsible for this damage.

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Again, I find that Locke substantially completed the work he was required to do under the contract, and that Mr. Frantz, in effect, accepted the work. It is true that the Corrugating company did some work to complete the job, but it is not necessary that a contractor should strictly fulfill his contract in order to recover thereon. A substantial compliance is sufficient (see *Ashley v. Henahan*, 56 Ohio St., 557). Moreover, controversies had arisen at the time Locke abandoned the work, which make it questionable if he should continue.

Again, I find that the Corrugating company was at fault in not sending materials for some time after September 22. The evidence fails to show that Locke was compelled to pay his workmen during the time he was waiting for the material, but it does show that he lost twenty days of his time, which he estimates at \$10 per day. My conclusion is that for this breach of contract Locke is entitled to recover the sum of \$200. My further conclusions are that Locke is entitled to recover from the Corrugating company the amount unpaid him on the contract, viz., \$121.63, and also the sum of \$284.80, the amount for extra work which he was compelled to do by reason of the blowing off of the roof.

The different workmen who have filed liens are entitled to have their claims paid proportionately out of this sum. The Corrugating company is liable for all costs.

Edwin Gholson and J. H. Cabell, for Cincinnati Corrugating Company.

E. H. Williams, for Elmer E. Locke, and others.

NEGLIGENCE—STREET RAILROADS—ORDINANCES.

[Hamilton Common Pleas, March, 1900.]

MARY A. LEWIS V. CINCINNATI ST. RY. CO.

1. RULE AS TO DUTY OF PERSONS CROSSING STREET RAILWAY TRACKS.

There is no absolute rule requiring one driving along a street upon which are the double tracks of a street railroad, to either stop, look or listen before crossing such tracks, or to look back one or more times before going upon the tracks, to ascertain whether or not there is a car operated by electricity coming from behind, in such a manner as to probably or inevitably bring about a collision. The question whether or not the conduct of a party in driving upon the tracks of a street railroad constitutes negligence should, in each case, be submitted to the jury.

2. RIGHT TO LEGISLATE ON THE QUESTION OF SPEED.

The right of the authorities of a municipal corporation to legislate on the question of speed of street cars only exists by reason of the fact that their police power is called into existence for the protection of individuals and their property, when legally using the streets.

3. PURPOSE OF MEETING THE DEMANDS OF THE PUBLIC FOR RAPID TRANSIT.

There is no authority to justify the passing of an ordinance which could only be operative as an exercise of police power, for the purpose of meeting the

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demands of the public for rapid transit, and thus making the use of the public streets a constant menace to life, limb and property.

4. ORDINANCE OF OCTOBER 25, 1889, IS VOID.

The ordinance of Cincinnati, passed October 25, 1889, permitting street railroad companies to operate their electric cars at a schedule speed not exceeding ten miles an hour, is not only unreasonable, but subversive of the rights of the people in the streets, and is not a proper exercise of police power, and is, therefore, void.

5. VALIDITY OF ORDINANCE PASSED FEBRUARY, 1879.

The ordinance of Cincinnati passed February, 1879, limiting the speed at which street cars may be drawn in the streets of the city to six miles an hour, applies as well to electric cars as to horse cars, although at the time such ordinance was passed no electric cars were in use; and said ordinance is now in force.

HOLLISTER, J.

There were two points made by counsel for defendant in their argument at the hearing of their motion for a new trial. One was that the court erred in its charge to the jury, and in its refusal to give certain special charges on the subject of the duty of the plaintiff before and at the time of driving with her horse and buggy upon the defendant's street railroad track.

The court was of opinion, at the trial, that the question whether or not the plaintiff's conduct in driving upon the track was negligence should be submitted to the jury; that no absolute rule could be laid down requiring one driving along a street upon which were street car tracks to either stop or look or listen before crossing over the track, or to look once or more times before going upon the tracks to ascertain whether or not a car operated by electricity might bring about a collision. The court still adheres to that view, and thinks that its action in charging the jury as it did and in refusing to charge as requested was correct.

The other ground for a new trial was that the court erred in charging the jury that the ordinance of the city regulating the speed of street cars, in force at the time of the accident, limited their operation to six miles an hour.

The ordinance of February, 1879, art. I, sec. 18, Coppock & Hertenstein's ordinances, provides that:

"No cars shall be drawn at a greater speed than six miles an hour."

Ordinance No. 4286, Henderson's ordinances, 113, passed October 25, 1889, provided for an extension of Route No. 7, the construction of an electric system of motive power along that route and upon a portion of Route No. 5, and fixed rates of speed on certain routes.

In Section 2 it is ordained:

"That the schedule time for operating cars over said Routes 5 and 7 and over all portions of said company's other street railroad routes over which any kind of motors or means of rapid transit are authorized to be used shall not exceed ten miles an hour. And art., I, sec. 18, of the general street railroad ordinances, passed February 7, 1879, or any

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provision of any other section relative to the speed at which each car shall operated shall not be applicable to such routes."

On September 16, 1892, the board of legislation sought to repeal the ordinance of October 25, 1889, by passing an ordinance expressly repealing it, and ordaining that:

"All rights, privileges and franchises granted to the Cincinnati Street Railway Company under and by virtue of said ordinance be and the same are hereby forfeited and held for naught.

And the corporation counsel was directed to institute the necessary legal proceedings to enforce the provisions of the repealing ordinance.

In 1896 the board of administration, by resolution, revised the terms and conditions of all of the grants and franchises to the Cincinnati Street Railway Company, and, among other things, resolved that:

"All of the provisions of the general ordinance providing for the construction, operation and government of street railroads, passed February 7, 1879, and all other ordinances extending and providing for the operation of the roads of any of said companies, in so far as the same are consistent herewith, shall apply to and become and be a part of the terms and conditions of the grant hereby made."

It is assumed, for the purposes of this case, that it was impossible for the board of legislation to repeal, by its ordinance of 1892, the ordinance of 1889, in such a way as to affect any vested rights acquired under the former ordinance, and that the board could not, by ordinance work a forfeiture of those rights, although the company may not have run its cars as the ordinance required, and this, independent of the fact, that it does not appear that the corporation counsel took any steps to legally establish its forfeiture.

While it can not be doubted that the proper municipal authorities may, by the exercise of police power and in the discharge of the duties of the trust for the public under which it has supervision of and care of the streets, from time to time, regulate the speed of cars and all other vehicles using the streets, yet it is assumed further that the object of the repealing ordinance was not to bring about a change of the rate of speed at which cars could legally be run, but was to affect only the rights or privileges or franchises granted in the ordinance of 1889, and that, as it was invalid in respect to its real object, any incidentally declared purpose was ineffectual also.

These assumptions leave the provision of the ordinance of 1889, fixing the schedule rate of speed at ten miles an hour, in force unless there is some good reason why that ordinance is not operative.

It will be observed that the speed per mile is not limited to a maximum of ten miles per hour. The ordinance permits a schedule time of ten miles an hour. That is, the total number of miles in the route over which the car is operated shall not be covered its operation in a less time than ten miles an hour. Under such a provision the car might be run

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at a much greater speed over some portions of the road, and, in order to maintain the average, would necessarily at some places be operated at perhaps twice ten miles an hour. It will be noticed that the ordinance makes no difference in its requirement between the portions of the routes which include streets comparatively unfrequented and those in which a condition of semi-blockade is often present.

The court assumes that it would be impossible to maintain a speed of ten miles an hour in the crowded streets, during the ordinary business hours, unless pedestrians and drivers of vehicles should waive their rights in those portions of the streets in which the car tracks are found. The effect of this would be the abandonment of their rights in a portion of a large number of the streets and the appropriation of that part by the street railway company.

Whatever may be the exigencies and necessities of modern rapid transit, the law has not yet donated to street railroad companies the use of any part of the streets to the exclusion of those whose rights in the streets were fixed long before cars operated in streets by animals, cables or electricity were heard of, and by virtue of whose rights alone the courts have permitted the use of cars on fixed rails in the street as simply another method of using vehicles in the streets, not differing, in the underlying principles involved, from any other vehicle used for travel. Yet, under this ordinance, it is in the power of the company to operate its cars anywhere, on any of its routes, not only at ten miles an hour, but at any other greater speed which it chooses, and at any speed required by its schedule in making its round trips, limited only by the requirement that no schedule can be adopted for any route which will involve an average speed of over ten miles an hour.

It is beyond discussion that under this ordinance there is no limitation upon the speed at any point in a route, be it the most frequented inter sections of the most crowded streets in the city, or the open ways in the comparatively sparsely settled parts of the city, where the travel may not be greater than in many country roads.

There being no limitation, there is an implied permission to operate the cars at any speed, at any point on the route, so long, only, as the schedule speed for the entire route is not exceeded. The man at the motor has no authoritative guide of such a nature as to bring about a penalty on the company or himself if he fails to follow it, and is only governed by his own good sense and judgment in determining the rate of speed he shall use in the crowded streets of the city.

The ordinance has not, therefore, for its justification, the public welfare and safety, which alone would warrant legislative action regulating the speed of cars, but its only effect is to bring about a result exactly the reverse; and it permits a street railroad company, under color of an ordinance regulating the speed of its cars in order that public

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welfare may be conserved through its observance, to operate practically at such rate of speed as its agents may see fit to adopt.

The ordinance, therefore, fails of the purpose for which alone it could be passed, and it really sanctions that which it is its office, and only office, to prevent. It has no element of protection to the public in it, and is, therefore, not only unreasonable, but it is more than that; it is subversive of the rights of the people in the streets. Surely no ordinance can be permitted to stand which brings about such a result.

It is said, in *Adolph v. Railroad Co.*, 76 N. Y., 530, that "A reasonable and lawful speed for a street car, in the absence of statute or ordinance upon the subject, is the average rate of carriages used to convey passengers by horse power."

The conduct of the owners of animals and vehicles in the use of the streets is prescribed by section 17 of the ordinance of September 8, 1856, *Coppock & Hertenstein's ordinances*, chapter 22, page 338:

"It shall be unlawful for any person * * * to ride, drive or lead any animal or animals or drive or cause to be driven any vehicle drawn by any animal or animals faster than the rate of five miles per hour, or in a manner to endanger the body or property of any person. It shall be unlawful for any person to ride, drive or lead any animal or animals faster than a walk, or drive or cause to be driven any vehicle whatever while turning around a corner faster than a walk."

If there is no difference in principle between the rate at which a vehicle may be propelled in the city and the rate at which a street car may proceed, and if the rule laid down by *Adolph v. Railroad Co.*, *supra*, be the true one, it would seem that the lawmaking power of the city had, prior to the ordinance of 1879, practically established the rate of speed at which a car might be operated. If the principle is the same, and vehicles generally should not proceed faster than five miles an hour through the crowded streets, there is apparently no reason why a street car should go any faster. If the test is public welfare and safety, there can be no reason why one kind of vehicle should be operated more rapidly than any other. If the proper test is the needs of modern rapid transit, then it is not difficult to understand that such a rate would be wholly inadequate. But the right of the public authorities to legislate on the question of speed only exists by reason of the fact that their police power is called into exercise for the protection of individuals and their property legally using the streets. And there can no authority be found, anywhere, so far as the court is advised, which would justify the passing of an ordinance which could only be operative as an exercise of police power, for the purpose of meeting the demands for rapid transit which the public at this day make upon those who furnish the means of public conveyance. The way to meet those demands is not to expose the citizen and his property to continual danger in the lawful use of the streets, but is to require the rapid transit company either to elevate its

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tracks or to establish a system of subways, both of which plans have been adopted in other cities of this country. While the streets are used by the pedestrians and the drivers of ordinary vehicles, there is no demand on the part of the public for rapid transit which will justify an ordinance making the use of the streets a constant menace to life, limb and property.

The ordinance of 1879 limits the rate at which cars shall be run to six miles an hour. At that time there were no cars propelled by electricity here; but if it was dangerous to cause horse cars to run at a greater speed than six miles an hour (and it was possible to run them by such means at a greater speed), no good reason appears why it is any less dangerous to run a car weighing sometimes as much as ten tons, operated by electricity, at a greater speed than that. Apparently, therefore, there is no reasonable ground for saying that the ordinance fixing the rate at six miles an hour, because it was passed in the time of horse cars, should not apply to the electric cars. If the question becomes one of weighing the safety and welfare of the public on the one hand, and the necessities and desires of the public for rapid transit on the other, the scales would certainly adjust themselves, in balancing, to the former alternative.

The court is constrained to hold that the ordinance of 1889 is void. And, as it is void, the only ordinance in force up to the resolution of 1892, and by it readopted, is the ordinance of 1879, prohibiting a greater rate of speed than six miles an hour.

The motion for a new trial is overruled.

E. W. Kittredge, J. W. Warrington and George Warrington, for the motion.

Prescott Smith, contra.

MASTER AND SERVANT.

[Hamilton Common Pleas, March, 1900.]

HARBISON v. ILIFF

1. TEST OF MASTER'S LIABILITY FOR ACTS OF HIS SERVANTS.

The test of liability of a master for the acts of his servants, is whether the injury complained of was committed by the authority of the master, expressly conferred or fairly implied from the nature of the employment and the duties incident to it.

2. EXTENT OF MASTER'S LIABILITY FOR ACTS OF SERVANTS.

A master is liable to third persons for the frauds, torts, negligence and misdeeds of the servant in the course of his employment, though wilful and malicious, and although the master did not authorize or know of such acts and even forbade or disapproved them; but when the act is not within the scope of his employment, or expressly or impliedly in obedience to the master's orders, it is an act of the servant and not of the master, and the servant alone is responsible therefor.

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3. WHEN MASTER IS LIABLE FOR SERVANTS' ACTS OF VIOLENCE.

Where the servant has authority to commit an act of violence under certain contingencies, the master is liable for the consequences of such an act when committed by the servant under the belief that such a contingency had occurred, or where he uses unnecessary violence, or does it in a manner which makes its consequences unnecessarily injurious, no matter how wilful, malicious and unauthorized the acts may be, or even though he desire to injure his master.

4. MOTIVE OF SERVANT IS IMMATERIAL.

Where a master has a duty to perform and intrusts it to a servant, who disregards it to the injury of another, it is immaterial, so far as the liability of the master is concerned, with what motive or for what purpose the servant neglects the duty.

5. MASTER NOT LIABLE FOR THE LARCENY OF HIS SERVANT.

A larceny of the servant not authorized or ratified by the master, immediately following an unwarranted trespass, which trespass was directed and authorized by the master, such larceny having been committed not as a means or for the purpose of performing the master's work or connected with the trespass, is not within the scope of his authority, and does not make the master liable.

6. RULE IN DETERMINING AGENT'S AUTHORITY.

A principal is bound to concede that an agent is acting for him whenever a reasonably prudent man, under like circumstances with the third party caused to act affirmatively or negatively, would conclude that the agent was so acting, provided the appearance of things upon which such third person acts has a causal relation to the injury.

HEARD on demurrer to petition.

PFLEGER, J.

Plaintiff sued his landlord, the defendant herein, alleging in his second cause of action that "during plaintiff's absence from his residence the defendant employed painters, without the knowledge and consent of plaintiff and without authority of law, to go upon the said premises and as defendant's servants, employees and agents, and under the authority and direction of the defendant, broke and enter said house; that said painters in and upon said premises, did wrongfully mutilate and destroy, take and carry away a lot of chattel property of the value of seven hundred and seventy-five dollars," for which he demands judgment.

Defendant demurs to this allegation on the ground that it does not state facts sufficient to constitute a cause of action, claiming that the employer is not liable for the larceny of his employe, not being within the scope of his employment, and that the acts committed were for the personal gain and advantage of the employe.

But one case cited by the plaintiff and one by the defendant have any bearing upon the issue. No case has been cited or found covering the larceny of a servant. It is necessary therefore that the demurrer be decided upon principle.

That a master is liable for the acts of his servants is in direct antagonism with the broader doctrine that every person shall be held to answer for his own wrong. Therefore, this doctrine is regarded with much jealousy by the courts, and is circumscribed into as narrow limits as is consistent with the true interests of society. Servants are gener-

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ally irresponsible and unable to respond in damages; so it is regarded as no more than just that he who has made it possible for him to injure another should, so far as an injury results from the exercise of the power conferred upon him, be responsible in his stead. *Wood on Master and Servant*, sec. 277.

The test of liability is whether the injury was committed by the authority of the master expressly conferred or fairly implied from the nature of the employment and the duties incident to it. The general and inflexible rule controlling in that case is that for all acts done by the servant under the express orders or direction of the master, as well as for all acts done in the execution of his master's business within the scope of his employment, the master is responsible; but when the act is not within the scope of his employment, or expressly or impliedly in obedience to the master's orders, it is an act of the servant and not of the master, and the servant alone is responsible therefor. *Wood on Master and Servant*, sec. 279, sec. 286.

There is no such broad rule of law as that a master is not liable for the unauthorized wilful and wrongful acts of his servant, and though such a doctrine has often been propounded in judicial opinions it is now so thoroughly overruled as to need no further notice. *Shearman and Redfield on Negligence*, 150.

Where the servant has authority to commit an act of violence under certain contingencies, the master is liable for the consequence of such an act when committed by the servant under the belief that such a contingency had occurred, or where he uses unnecessary violence, or does it in a manner which makes its consequences unnecessarily injurious, no matter how wilful, malicious and unauthorized the acts may be, or even though he desire to injure his master. *Shearman and Redfield on Negligence*, 154.

To show how far the courts have gone in holding the master liable for the torts and crimes of servants and when he has been exonerated a few cases may be cited.

In 79 Ga., 460, a railroad company was held liable for murder committed at the place of duty assigned to him by an insane agent known by the principal to be insane.

In *Denver v. Harris*, 122 U. S., 608, a railroad company was held liable for personal violence used by employees striving to obtain possession of certain lands.

In *Levi v. Brooks*, 121 Mass., 501, the master was held for a wilful assault committed by the servant, who was authorized to remove certain furniture for a debt, and it was said no matter how wanton or reckless the act, if the violence was for some private end or advantage of the servant to satisfy some spite or revenge, the master would not be liable. The test here is said to have been whether the act was done for the purpose of accomplishing the master's work.

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In *Toledo v. Harmon*, 47 Ills., 298, a railroad company was held liable because an engineer, while his locomotive was standing at a crossing, caused the steam to escape whereby a team of horses became frightened, was made to run away and injure persons, on the ground that the master had placed these agencies in the servants' hands and they were used, though wilfully and negligently, to do the mischief complained of. To the same effect was *Chicago v. Dickson*, 63 Ills., 151; *Homans v. Temple*, 11 Ills. App., 39.

In *Barber v. O'Connell*, 162 Mass., 319, the master employed a boy to take care of horses, and while leading such horses from the stable to the yard, this boy invited another to ride, and the second boy was injured. The master was held not liable on the ground that this was not done as a means or for the purpose of performing that work.

In *Cox v. Kealy*, 36 Ala., 340, a servant permitted a steamboat to collide with a raft, and it was held that the master was not liable where the servant actually wills and intends injury or steps aside from the purpose of the agency and commits and inflicts an intended wrong.

In *Golden v. Newbrand*, 57 Iowa, 59, a watchman, authorized to prevent breaches of the peace, pursued a drunken man beyond the property of the master and shot and wounded the man. It was held that it was not in the line of the watchman's duty and that the master was not liable.

In *Wright v. Wilcox*, 19 Wendel, 343, it was held that the dividing line was the wilfulness of the act. The last case is one cited by counsel for defendant, but this doctrine has long since been exploded.

The master was held not liable for trespass in the following cases: 1 East., 106; 24 Conn., 40; 2 Mich., 519.

While the terms, "the course of the employment" and "the scope of the authority," are hardly susceptible of accurate definition, both in contract and in tort, the principal is bound to concede that the agent is acting for him, similar to the rule in negligence cases, whenever a reasonably prudent man under like circumstances with the third party caused to act affirmatively or negatively, would conclude that the agent is so acting, provided the appearance of things upon which such third person acted has a causal relation to the injury.

In cases where railroad companies have been held responsible for assaults committed by their servants upon passengers, the ground of liability shifts and they are held on the theory that they undertake an additional duty involving utmost care and good faith, and the master's liability for the fraud of the agent in the course of his master's business was placed on the ground of public policy, that it was more reasonable that the principal shall suffer who has placed his agent in the position of trust than the irresponsible stranger. *Erie City Iron Works v. Barber*, 106 Pa. St., 125.

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Our own Supreme Court has, however, in a number of cases stated the doctrine applicable to this case more clearly than any that I could find, although none of these have been cited by either counsel. It was held in *Railway Co. v. Shields*, 47 Ohio St., 387, 394, that "it was necessary to distinguish between the departure of a servant from the employment of the master and his departure from or neglect of a duty connected with that employment. A servant may depart from his employment without making his master liable for his negligence when outside the employment of the master; and he so departs whenever he goes beyond the scope of his employment and engages in affairs of his own. But he can not depart from a duty entrusted to him, when that duty regards the rights of others in respect to the employment of dangerous instruments by the master in the prosecution of his business, without making the master liable for the consequence." On page 395 it is held that the question is simply whether the wrong inflicted was incidental to the discharge of the servant's functions. Whatever the servant's orbit, when he ceased to be a servant his negligence is not imputable to the master, but within that orbit it is so imputable, whatever the master may have meant. The motive of the servant is immaterial.

In *Stranahan v. Coit*, 55 Ohio State, 398, our Supreme Court held that the master is liable for the malicious acts of his servant, whereby others are injured, if the acts are done within the scope of the employment and in the execution of the service for which he was engaged by the master, whether the act be one of omission or commission. *Railway Co. v. Bank*, 56 Ohio St., 351, 381, 388, 391. Where a master owes to a third person the performance of some duty, as to do or not to do a particular act, and commits the performance of the duty to a servant, the master can not escape responsibility if the servant fails to perform it, whether such failure be accidental or wilful, or whether it be the result of negligence or malice. Nor is the case altered if it appear that the malice be directed to the master or is contrary to his purpose or instructions.

In *Stranahan v. Coit*, 55 Ohio St., 398, 410, it was held that the tendency of modern cases is to attach less importance to the intention of the agent and more to the question whether the act was done within the scope of the agent's employment and his authority, and within the powers conferred on him as agent. Also *Railway Co. v. Bank*, *supra*. When they are done outside of the course of the agent's employment and beyond the scope of his authority, as where the agent steps aside from his employment to gratify some personal animosity or to give vent to some private feeling of his own, the principal is not liable.

In distinguishing cases in Ohio the court in *Railway Co. v. Shields*, *supra*, illustrated by holding that in case a servant in charge of a construction train left it on the track and built a fire which through his

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negligence consumed property of another, and in the meantime loss of life resulted from a collision with the train so negligently left standing on the track, the master would not be held liable for the loss resulting from the fire because the act was done outside of the servant's employment, yet he would be held responsible for the loss, which occurred from leaving the train on the track, because this was done within the scope of the employment.

And in *Stranahan v. Coit, supra*, p. 416, the court distinguished the case of *Railroad Co. v. Wetmore*, 19 Ohio St., 110, in which a passenger by his importunate conduct and abusive language towards a baggageman induced the latter to strike him with a hatchet, it was held that while the hatchet was an instrument furnished by the master, the master was not liable for the act, because it was not done in the execution of the service of the master. Had the baggageman smashed the passenger's trunk the master would have been held liable therefor. Or in the case then before it, the court said, that had a servant, who purposely delivered adulterated milk without the knowledge of and for the purpose of injuring the master, lashed the customer with the master's whip, the master would have been exonerated. In delivering the milk the master was held liable.

It is apparent therefore that the larceny of a servant, not authorized or ratified immediately following an unwarranted trespass, which trespass was directed and authorized by the master, such larceny having been committed not as a means or for the purpose of performing the master's work or connected with the trespass, is not within the scope of his authority, and does not make the master liable. The allegation is that the master authorized and directed the forcible entry, yet the damage is alleged to have resulted not from such entry but from the "wrongfully mutilating, destroying, taking and carrying away" of certain chattels without any charge that the latter was either authorized, directed or ratified by the master, or any allegation of facts warranting the inference that the mutilation, destruction or taking of the goods was in any way a part of or connected with the employment.

The demurrer is sustained.

Keam & Keam, for the demurrer.

Swing, Cushing & Morse, contra.

SEWER ASSESSMENTS—LIMITATIONS.

[Superior Court of Cincinnati.]

CINCINNATI, ETC. V. KENNEDY, TRUSTEE.

1. ERROR IN VALUATION FOR ASSESSMENT—NOT FATAL.

Where, by error of valuation of a certain piece of property, the municipal authorities make the number of installments in which a sewer assessment is to be paid, less than they should be, whereby the yearly installments exceed one-tenth of the value of the property (the limitation by sec. 2272, Rev. Stat.), the invalidity of such installments beyond one-tenth is only as to the yearly collection and not as to the assessment itself.

2. CASE IS WITHIN CURATIVE STATUTES.

The facts above stated are within the provisions of curative section 2289, Rev. Stat., relating to technical irregularities, and sec. 2327, Rev. Stat., requiring liberal construction.

3. ORDER SHOULD BE TO EXTEND PAYMENTS.

And, where the cost of the improvement is reasonable, and the assessment is otherwise valid, the order should be that the assessment be paid in installments in conformity with the statute.

4. EXTENSION DOES NOT DESTROY UNIFORMITY.

Such an extension of the time of payment does not render the assessment void for want of uniformity, where the assessment was levied upon all property by the same method and the yearly limitation is applied to all property.

This case was submitted upon the following agreed statement of facts:

Plaintiff and defendant respectfully present to the court a submission of the following controversy between them, and agree upon the following case, to-wit:

The plaintiff claims to recover of the defendant, the sum of \$224.80, with interest thereon from November 9, 1896, on the following facts:

The city of Cincinnati is a municipal corporation of the first grade of the first class under the laws of Ohio.

On October 3, 1895, the board of administration of said city duly passed and transmitted to the board of legislation with recommendation for passage, a resolution declaring it necessary to improve Dreman avenue with other connected streets, making a complete sewer in that locality; that afterwards, to-wit: on October 18, 1895, the board of legislation of said city, duly passed a resolution declaring it necessary to improve said Dreman avenue with other streets aforesaid, and afterwards, to-wit: on December 27, 1895, the said board of legislation of said city, two-thirds of the members concurring therein, duly passed an ordinance to improve said street by sewerage, in accordance with the plans and specifications on file at the office of the engineer of said city, which ordinance provided, among other things, that the expenses of said improvement and the damages due on account thereof, to the amount allowed by law to be assessed per front foot upon the property bounding and abutting upon said improvement according to the laws and ordi-

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nances on the subject of assessments; the assessments therefor to be payable in one installment and to be certified to the contractor in payment for the work, and all expenses of such improvement above the amount allowed by law to be assessed, shall be paid out of the trunk sewer fund under the provisions of an act of the general assembly of the state of Ohio, passed March 12, 1887, entitled "An act for the construction of trunk sewers in cities of the first grade of the first class," and the acts amendatory thereof and supplementary thereto, and that subsequently said assessment was so assigned and transferred and certified to Van Sandt & Meeds in payment for said work; that afterwards on, February 27, 1896, in pursuance of advertisements for proposals, bids were received for the construction of said sewers, and that said Van Sandt & Meeds were the lowest bidders.

That afterwards on March 9, 1896, a resolution to contract between said Van Sandt & Meeds and said city, was duly passed by the board of legislation and said contract was signed on June 20, 1896, by said parties; said work was completed and accepted by the said city. On November 9, 1896, the board of legislation of said city duly passed an ordinance assessing a special tax on all property bounding and abutting on said streets, in the sum of two dollars per front foot. All of said resolutions and ordinances were duly published according to law; that the defendant, as such trustee, was, at the time of the passage of said assessing ordinance, and still is, the owner of the following described real estate:

"Being lots numbers 104 and 105 in C. E. Williams' subdivision as the same appears of record in plat book 1, p. 124, of the recorder's office of Hamilton county, Ohio, said premises fronting 112 40-100 feet on the on the north side of Dreman avenue."

The assessment of \$2.00 per front foot against the above premises amounts to the sum of \$224.80; that said assessment was due and payable on November 9, 1896; that the value of the said lots after said improvement was made, is \$600.00.

The defendant has paid to plaintiff, the sum of sixty dollars, (\$60.00) the same by agreement to be in full if defendant is not liable, by reason of said assessment, for any larger sum, and to be on account if the defendant is so liable.

The question submitted is, whether the defendant is liable for any further part of said sum of \$224.80, in excess of said \$60.00 already paid, and if so, for how much.

It is agreed, that if the defendant is so liable, that the plaintiff has a lien to secure such sum upon the above described property.

SMITH, J.

Resistance to the payment of any amount greater than \$60.00, is based upon the contention that where a sewer has been constructed and

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assessment made for the same by the front foot and the assessment declared payable in one installment, if such assessment exceeds one-tenth of the value of the property after the improvement has been made, such excess beyond said one-tenth is void and the amount of the same lost to the city. On the other hand, the contention of the city is, that the excess beyond the one-tenth is not void but is merely not collectible at the time designated in the assessing ordinance, and is collectible in a future year or years (as the case may require), provided that the amount collected for each year does not exceed one-tenth of the value of the property.

The statute prescribes three modes of assessment for the construction of sewers: (1) according to benefits, (2) according to valuation, and (3) according to the abutting or front foot. Secs. 2264, 2382, 2383, 2385.

When the assessment is according to benefits, three judicious free-holders of the corporation are appointed whose duty it is to make the assessment; their report is duly filed and thereupon opportunity is given to those objecting to be heard upon their objections.

When the assessment is according to valuation, the assessed valuation of the property for taxation purposes is the basis upon which the assessments are made.

When the assessment is by the abutting or front foot, the method of arriving at the amount of the assessment per foot, consists in dividing the total cost of the work by the number of feet to be assessed.

In the present case the assessment was by the front foot.

The proposition of the defendant is, that if by an error of judgment as to the valuation of a certain piece of property the municipal authorities make the number of installments in which an assessment is to be paid less than they should be, that the municipality is be punished by having the excess over one-tenth in each installment declared void. If such a serious result were intended by the legislature to follow from an error of judgment in this respect, it seems to me, that the legislature at least, would have made some provision for a preliminary investigation as to the value by the municipal authorities; and the circumstance that no such provision is made, is significant to my mind that no such serious result as the partial destruction of what would otherwise be a perfectly valid assessment was within the contemplation of the legislature.

The language of sec. 2271, Rev. Stat., upon which the defendant bases his detention, is, itself significant against the contention. Thus it is declared:

"In cities of the first grade of the first class, and in corporations in counties containing a city of the first grade of the first class the tax assessment especially levied or assessed upon any lot or land for any improvement shall not, except as provided in sec. 2272, exceed twenty-five per centum of the value of such lot or land after the improvement is made and the cost exceeding that percentum shall be paid by the corpo-

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ration out of its general revenue; and except as provided in section twenty-two hundred and seventy-two, there shall not be collected of such assessment in any one year more than one-tenth of such value of the property on which the assessment is made."

Section 2272, Rev. Stat., relates to assessments made upon petition of the property holders, and has no relevancy to this case.

It will be observed from the language of the section quoted that it declares the assessment shall not exceed twenty-five per centum of the value of the land;—the necessary inference from which declaration is, that such excess, if any, is void; but with respect to the provision that the assessment for any one year shall not be greater than one-tenth of the value of the property, it is declared "there shall not be collected of such assessment in any one year, more than one-tenth of the value of the property;" and it seems to me that the statute should be given the natural construction of its language and one that does justice to all parties and that the invalidity of any assessment beyond one-tenth, is only as to its collection in one year and not to the assessment itself.

It is urged, however, that to give the statute this construction would result in a want of uniformity in the assessment inasmuch as with respect to some pieces of property the entire assessment might be collected as made, in others it would not, but the collection of part would necessarily be postponed. I do not think such a result would destroy the uniformity of the assessment in the sense in which that word is used in this state. The assessment having been levied upon all property by the same method, viz., in this case by the front foot, and the right to claim exemptions from a collection of more than one-tenth in any year applying to all property, it follows that all property is treated by the same rules and the assessments would not be void for want of uniformity.

I am of the opinion that the irregularity in this case is one such as is intended to be provided for in the curative secs. 2289 and 2327, Rev. Stat., and that inasmuch as it is conceded that the cost of the work is reasonable, the order of the court should be, that the assessment be paid in two annual installments of sixty dollars each, and a third annual installment of thirty dollars and that the plaintiff pay the costs of the proceeding.

Archer & Osler, Ellis G. Kinkead, corporation counsel, for plaintiff.

H. P. Kauffman, for defendant.

EMPLOYER AND EMPLOYEE—LABOR UNION.

[Lucas Common Pleas, April 5, 1900.]

STATE OF OHIO v. LA MONTE BATEMAN.

1. CONSTITUTIONAL RIGHT TO EMPLOY LABOR AND TO CONTRACT.

Section 1, Art. 1 of the constitution of Ohio, declaring that every person has an inalienable right to liberty and to acquire, possess and protect property, guarantees to every person the right to make and enforce all proper contracts and to employ, in carrying on his business, such persons and such lawful means as he may choose, free from all restraints except such as are necessary for the common welfare.

2. RIGHT OF EMPLOYER AND EMPLOYEE.

There is necessarily implied in the right of personal liberty and the right to contract, the right of the employer, when the employment is at will, to discharge and to refuse to longer employ a member of a labor union; and also the right of a member of a labor union to quit the service of his employer; and neither is under obligation to satisfy the other that the reason for his action is a good one.

3. PRINCIPLES APPLIED TO SEC. 4364-68, REV. STAT.

The act of April 14, 1892, sec., 4364-68, Rev. Stat. providing that it "shall be unlawful for any individual, firm, agent, officer or employee of any company or corporation, to prevent employees from forming, joining and belonging to any lawful labor organization, and any such individual, member, agent, officer or employee that coerces or attempts to coerce employees, by discharging or threatening to discharge from their employ, or the employ of any firm, company or corporation, because of their connection with such lawful labor organization, shall be guilty of misdemeanor," etc., is in conflict with Sec. 1, Art. 1, of the constitution of Ohio, providing that "all men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property" and with Sec. 19, Art. 1, of the constitution of Ohio, which provides that "private property shall ever be held inviolate but subservient to public welfare." The act is, therefore, invalid.

4. SCOPE OF THE STATUTE—SEPARATE OFFENSES.

The acts which the statute in question declares to be unlawful and punishable, are the discharge by an employer of his employee, or the threat to discharge him because of his connection with a labor organization. The words "coerce" and "attempt to coerce" are the statutory names of the two separate offenses.

5. DISCHARGE NOT AN ATTEMPT TO COERCE.

To constitute an "attempt to coerce," the means employed must have some adaptation to accomplish the intended result. A discharge is not such an act as is calculated to coerce and does not constitute an "attempt to coerce" within the meaning of the act referred to.

6. ACT NOT AN EXERCISE OF POLICE POWER.

The act in question cannot be sustained as a valid exercise of the police power of the state, inasmuch as the subject-matter in no way affects the public welfare, health, safety or morals.

7. PRACTICE—QUESTIONS BY DEMURRER TO INDICTMENT.

The proper practice, to raise the question as to whether a statute under which an indictment is found, is in conflict with federal or state constitutions and whether the facts alleged constitute an offense against the laws of the state, is by demurrer.

DEMURRER to indictment.

PUGSLEY, J.

The defendant is charged in the indictment with the violation of the act of April 14, 1892, entitled "An act to protect employees and guarantee

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their right to belong to labor organizations." The act is sec. 4864-68, Rev. Stat., and reads as follows:

"It shall be unlawful for any individual, or member of any firm, or agent, officer or employee of any company or corporation to prevent employees from forming, joining and belonging to any lawful labor organization, and any such individual, member, agent, officer or employee that coerces or attempts to coerce employees, by discharging or threatening to discharge from their employ or the employ of any firm, company or corporation, because of their connection with such lawful labor organization, shall be guilty of a misdemeanor, and upon conviction thereof in any court of competent jurisdiction shall be fined in any sum not exceeding one hundred dollars, or imprisoned for not more than six months, or both, in the discretion of the court."

The substance of the charge made in the indictment is, that upon the 11th day of October, 1899, LaMonte Bateman, who was the general manager of the Toledo Tube Company, a corporation, did attempt to coerce one Alonzo B. Cole, an employee of said corporation, by discharging him from the employment of said corporation for the sole reason that he was connected with a lawful labor organization, to-wit: The Bicycle Workers' Local Union No. 18.

The defendant has filed a motion to quash the indictment on the following grounds: First, that the statute under which the indictment was found is in conflict with the constitution of the United States and the constitution of the state of Ohio; and second, that the facts stated in the indictment do not constitute an offense against the laws of the state.

Upon the argument of this motion the question arose as to whether these objections to the indictment could be properly raised by a motion to quash, and it was agreed between counsel that a demurrer to the indictment might be considered as filed, if the court should be of the opinion that the objections could be presented only by demurrer.

Section 7249, Rev. Stat., provides when a motion to quash may be made, and reads as follows: A motion to quash may be made in all cases when there is a defect apparent upon the face of the record, including defects in the form of the indictment, or in the manner in which an offense is charged.

Section 7251, Rev. Stat., provides when a demurrer may be filed, and reads as follows: The accused may demur when the facts stated in the indictment do not constitute an offense punishable by the laws of the state, or when the intent is not alleged, and proof of the intent is necessary to make out the offense charged.

The question relates to the mere form of procedure, and is perhaps of little importance; but being of the opinion that strictly the proper practice would be to demur, I will adopt the suggestion of counsel and consider the objections as raised by demurrer.

The statute first declares that it is unlawful for any individual or the agent of a corporation to prevent employees from forming, joining and belonging to any lawful labor organization. This is general language, and for that reason, and because no penalty is prescribed for such unlawful prevention, this part of the statute is ineffective as a basis for a criminal charge, and cannot be considered except as the words contained in it are referred to in the subsequent part of the statute, and except possibly as bearing on the intent of the legislature in passing the law.

The statute then provides that any such individual or agent that coerces or attempts to coerce employees, by discharging or threatening to discharge from their employ or the employ of any firm, company or corporation, because of their connection with such lawful labor organization, shall be guilty of a misdemeanor, and punished by fine or imprisonment or both. The only coercion of employees which the statute makes a misdemeanor and punishable, is such as is accomplished or attempted by a discharge or threat to discharge because of their connection with a lawful labor organization. However much they may be coerced by other means, or whatever other act may be done to prevent employees from joining or belonging to a labor organization, it is not a punishable offense under this statute. The language is simply "Whoever coerces or attempts to coerce employees." What the employees are coerced to do or to refrain from doing is not stated. If we construe the statute liberally, and hold this language to mean, "Whoever coerces or attempts to coerce employees into withdrawal from a labor organization to which they belong," then let us apply the language as so interpreted to this case.

In the indictment, the defendant is charged only with an attempt to coerce, and an attempt to coerce not by threatening to discharge, but by an actual discharge. There was no coercion, because the employee did not withdraw from the organization. Was there an attempt to coerce? In order to constitute an attempt to do anything, the means employed must have some adaptation to accomplish the intended result. 1 Bishop on Criminal Law, sec. 749. If the employer threatens to discharge his employee because of his connection with a labor organization, then there may be some reason for saying that the threat is calculated to accomplish his withdrawal, and therefore that by threatening to discharge, the employer attempts to coerce. But how is an actual discharge adapted to accomplish his withdrawal? It could not have been in the contemplation of the defendant that in consequence of discharging the employee he would withdraw from the organization. The discharge was not such an act as could have the effect to coerce him or compel him against his will to withdraw. Notwithstanding the discharge, he was at liberty to leave the organization or remain in it as he chose. His withdrawal would not restore him to the service. If, therefore, it is

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assumed that an attempt to coerce is the act which the statute prohibits and declares to be a misdemeanor, it is a serious question whether the indictment in this case states an offense.

It is said by counsel for the state that an employer has the right to discharge his employee for any reason or without any reason, but that he has no right to coerce him or attempt to coerce him into withdrawal from a labor organization to which he belongs, and that an attempt to coerce is the offense or the gist of the offense which is charged in this case. I cannot assent to that view, first, because there can be no coercion, in contemplation of law, from the doing of a lawful act; and second, because there was no attempt to coerce, the discharge not being such an act as was calculated to coerce. For these reasons I am of the opinion, if any effect is to be given to the statute, that the act which it declares to be a misdemeanor and punishable, is the discharge by an employer of his employee, or the threat to discharge him because of his connection with a labor organization, and that the words "coerce" and "attempt to coerce" are to be considered as the mere statutory names of the offense.

To constitute the offense, a discharge or threat to discharge for the reason stated must be shown. Nothing more is required by the statute, and nothing else is alleged in the indictment.

The question, then, to be determined, is whether a law which makes it a crime for an employer to discharge or threaten to discharge an employee because of his connection with a labor organization is within the constitutional power of the legislature.

Section 1, Art. 14 of the amendments to the constitution of the United States provides that "No state shall deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 1, Art. 1, of the constitution of Ohio, provides that "All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and seeking and obtaining happiness and safety."

Section 19, Art. 1, of the constitution of Ohio, provides that "Private property shall ever be held inviolate, but subservient to the public welfare."

These are some of the constitutional provisions which, it is urged in behalf of the defendant, are violated by the statute under consideration. Two decisions have been rendered which are precisely in point;—one by the Supreme Court of Missouri, State v. Julow, 129 Mo., 163, decided in 1895, in which a statute similar to the Ohio statute was held to be unconstitutional, and the other by the court of common pleas of Hamilton county, in this state;—Davis v. State, 11 Dec. Re., 894, decided in 1898, in which the Ohio statute was held to be constitutional.

The statute of Missouri provides that: "No employer * * * shall enter into any contract or agreement with any employee requiring said employee to withdraw from any trade union, labor union, or other lawful organization of which said employee may be a member, or requiring said employee to refrain from joining any trade union, labor union or other lawful organization, or requiring any such employee to abstain from attending any meeting or assemblage of people called or held for lawful purposes, or shall by any means attempt to compel or coerce any employee into withdrawal from any lawful organization or society."

And by a subsequent section any violation of this act shall be punished by fine or imprisonment, either or both.

This statute, as will be noticed, is definite and broad, much more so than the Ohio statute. It is made unlawful for an employer to attempt by any means to compel or coerce any employee into withdrawal from any lawful organization or society. And under the latter clause of the statute the information in this case was found. The information charges that the defendant, who was the superintendent of a shoe company, notified one of its employees that unless he withdrew from membership of a labor association to which he belonged, he could no longer work for or be employed by said company; that the employee refused to withdraw from said association, and thereupon, for the reason aforesaid, he was by the defendant discharged from the service of the company.

As I have said, the statute expressly provides for an attempt to compel or coerce an employee into withdrawal from any lawful organization by any means, and the facts stated in the information present a case of such attempt to coerce much more clearly and definitely than the indictment in this case. The court say on page 172:

"For the present purpose it will be assumed that defendant attempted to do the act with which he is charged, and that it lay in his power to compel or coerce Simonds to withdraw from a lawful organization with which he was connected; because, by so doing all discussion of matters merely preliminary to the main question herein involved will be avoided."

After citing the provisions of the constitution of the United States and the constitution of the state of Missouri, which is quite like the constitution of Ohio, and after referring to numerous decisions, the court say on page 175:

"The law under review declares that to be a crime, which consists alone in the exercise of a constitutional right, to-wit: that of terminating a contract, one of the essential attributes of property, indeed property itself, under preceding definitions. Brought to the bar of a court on such a charge, the accused would have been prejudged in so far as the criminality of the act charged is concerned; no question could there be made or admitted as to the quality of the act; that would have been settled by the previous legislative declaration, and it would only remain

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to find the fact as charged, in order to declare the guilt as charged. But the fact as charged as already seen is not a crime, and will not be a crime, so long as constitutional guarantees and constitutional prohibitions are respected and enforced.

"If an owner, etc., obeys the law on which this prosecution rests, he is thereby deprived of a right and a liberty to contract or terminate a contract as all others may; if he disobeys it, then he is punished for the performance of an act wholly innocent, unless indeed the doing of such act guaranteed by the organic law, the exercise of a right of which the legislature is forbidden to deprive him can, by that body, be conclusively pronounced criminal. We deny the power of the legislature to do this; to brand as an offense that which the constitution designates and declares to be a right, and therefore an innocent act, and consequently we hold that the statute which professes to exert such a power is nothing more or less than a legislative judgment, and an attempt to deprive all who are included within its terms, of a constitutional right without due process of law."

It is also held in this case that the statute is obnoxious to criticism as class legislation, because it does not relate to all workmen, but only to those who belong to some lawful organization or society. And upon that subject the court say, on page 176:

"Here a non-trade union man, or non-labor union man, could be discharged without ceremony, without let or hindrance, whenever the employer so desired, with or without reason therefor, while in the case of a trade union or labor union man he could not be discharged if such discharge rested on the ground of his being a member of such organization. In other words, the legislature have undertaken to limit the power of the owner or employer as to his right to contract with, or to terminate a contract with, particular persons of a class, and therefore the statute which does this is a special, not a general law, and, therefore, violative of the constitution.

"Judge Cooley says: 'A statute would not be constitutional * * * which should select particular individuals from a class or locality, and subject them to peculiar rules, or impose upon them special obligations or burdens from which others in the same locality or class are exempt . * * *. Every one has a right to demand that he be governed by general rules, and a special statute which, without his consent, singles his case out as one to be regulated by a different law from that which is applied in all similar cases, would not be legitimate legislation, but would be such an arbitrary mandate as is not within the province of free governments.'"

I will also read from page 177 what the court say upon another feature of the case:

"Nor can the statute escape censure by assuming the label of a police regulation. It has none of the elements or attributes which per-

tain to such a regulation, for it does not in terms or by implication promote, or tend to promote, the public health, welfare, comfort or safety; and if it did, the state would not be allowed under the guise and pretense of police regulation, to encroach or trample upon any of the just rights of the citizen, which the constitution intended to secure against diminution or abridgement."

In *Davis v. State*, Hamilton common pleas, *supra*, Judge Sayler, after referring to the decisions that were cited in support of the contention that the Ohio statute was unconstitutional, expresses the opinion that these decisions are not applicable, and that not being clearly satisfied that the statute is unconstitutional, he is bound to hold it constitutional, under the rule that the case must be practically free from doubt to justify the court in holding an act of the legislature to be in conflict with the constitution.

This decision of the Hamilton county common pleas court was rendered before the decision of the Supreme Court of Missouri, and before several of the decisions of the higher courts of this state, which discuss analogous questions, and which I will refer to hereafter. I will first briefly review some of the authorities which were cited to Judge Sayler, and which he believed were not applicable to the Ohio statute. First, is *State v. Goodwell*, 33 W. Va., 179. In this case the court held that an act of the legislature of West Virginia which prohibits persons engaged in mining or manufacturing from issuing for the payment of labor any order or paper except such as is specified in the act, is unconstitutional and void. I will read from page 181 of the opinion of the court:

"The bill of rights of this state declares that 'all men are, by nature, equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot by any compact deprive or divest their posterity; namely, the enjoyment of life and liberty with the means of acquiring and possessing property, and of pursuing and obtaining happiness and safety.'"

"Can the legislature, in view of these constitutional guarantees, limit or forbid the right of contract between the parties under no mental, corporal or other disability, when the subject of contract is lawful, not public in its character, and the exercise of it is purely private and personal to the parties themselves?

"The court, in *People v. Gillson*, says: The term 'liberty,' as used in the constitution, is not dwarfed into mere freedom from physical restraint of the person of the citizen, as by incarceration; but is deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare. Liberty, in its broad sense, as understood in this country, means the right, not only of freedom from servitude, imprisonment, or restraint, but the right of

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one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation.' "

And again, on page 183:

"The property which every man has is his own labor, as it is the original foundation of all other property, so it is the most sacred and inviolable. The patrimony of the poor man lies in the strength and dexterity of his own hands; and to hinder him from employing these in what manner he may think proper, without injury to his neighbor, is a plain violation of this most sacred property. It is equally an encroachment both upon the just liberty and rights of the workman and his employer, or those who might be disposed to employ him, for the legislature to interfere with the freedom of contract between them, as such interference hinders the one from working at what he thinks proper, and at the same time prevents the other from employing whom he chooses. A person living under the protection of this government has the right to adopt and follow any lawful industrial pursuit, not injurious to the community, which he may see fit. And, as incident to this, is the right to labor or employ labor, make contracts in respect thereto upon such terms as may be agreed upon by the parties, to enforce all lawful contracts, to sue, and give evidence, and to inherit, purchase, lease, sell, and convey property of every kind. The enjoyment or deprivation of these rights and privileges constitutes the essential distinction between freedom and slavery; between liberty and oppression. These principles have been fully recognized and announced in many decisions of the Supreme Court of the United States, and other courts.

"The vocation of an employer, as well as that of his employee, is his property. Depriving the owner of property of one of its attributes is depriving him of his property, under the provisions of the constitution. The right to use, buy and sell property, and contract in respect thereto, including contracts for labor—which is, as we have seen, property—is protected by the constitution. If the legislature, without any public necessity, has the power to prohibit or restrict the right of contract between private persons in respect to one lawful trade or business, then it may prevent the prosecution of all trades, and regulate all contracts. 'Questions of power,' says Marshall, C. J., in *Brown v. Maryland*, 12 Wheat., 419, 'do not depend on the degree to which it may be exercised. If it may be exercised at all, it must be exercised at the will of those in whose hands it is placed.' "

Next is *People v. Gillson*, 109 N. Y., 389. It was held in that case that the provision of the penal code of New York which prohibits the sale or disposal of any article of food upon any inducement that any thing else would be delivered as a gift, prize, premium, or reward, is unconstitutional and void, because it violates the provision of the state constitution securing to every person liberty and property unless he is deprived

thereof by due process of law. The court held that the law is not valid as a proper exercise of the police power of the state, or as a health law or regulation of trade in food, to prevent the adulteration thereof; and also that it is not a valid exercise of the legislative power to enact what shall amount to a crime.

The next case is that of *Godcharles v. Wigeman*, 113 Pa. St., 431. In that case an action was brought by a laboror to recover his wages. The defendant, his employer, attempted to set off certain orders for goods which he had given to the plaintiff on third parties, and which orders were honored by said third parties and subsequently paid by the defendant. The plaintiff contended that this was not a valid set-off, relying upon the provisions of the act of the legislature of Pennsylvania known as the "Store Order Act," which required the employer to pay the wages of his employees exclusively in cash. The court held that the act attempts to prevent persons who are *sui juris* from making their own contracts, and is therefore unconstitutional and void.

Next is *In re Jacobs*, 98 N. Y., 98. In this case it was held that a law of New York which prohibits the manufacture of cigars in tenement houses in certain cases is unconstitutional, on the ground that it interferes with the profitable and free use of his property by the owner or lessee, and trammels him in the application of his industry and disposition of his labor, and thus in a strictly legitimate sense, arbitrarily deprives him of his property and some portion of his personal liberty.

These are the decisions that were cited to the court of common pleas of Hamilton county. In my judgment, they are applicable to the present case. If the rights guaranteed by the constitution, namely, the right to personal liberty, and the right to freely acquire, possess, and protect property, are infringed by the statutes involved in those cases, as there held, the same rights are infringed for the same reason by the statute under consideration. The grounds, or some of the grounds, upon which the statutes in those cases were held to be unconstitutional, certainly do apply to the law in question, although there may be other constitutional objections to the statutes in those cases which do not exist in this case.

There are a great many other decisions by courts of last resort in this country in which the subject is discussed even more fully, and which hold similar statutes to be unconstitutional. I will cite a few of the more modern cases, without taking the time to read from them: *Low v. Rees Printing Co.*, 41 Neb., 127; *Leep v. Railway Co.*, 58 Ark., 407; *ex parte Kuback*, 85 Cal., 274; *Ramsey v. People*, 142 Ill., 380; *People v. Marx*, 99 N. Y., 377; *People v. Warren*, 84 N. Y. Sup., 942; *Harding v. People*, 160 Ill., 459.

I will now refer to the additional Ohio cases which were decided after the case of *Davis v. State*. First, is the unreported case of *State v. Iron Co.*, 51 Ohio St., 682. In this case the Lake Erie Iron Com-

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pany was indicted for violating the provisions of the law which required the wages of certain employees to be paid twice a month. The court below held the law to be unconstitutional, and sustained a demurrer to the indictment, and this decision was affirmed by the Supreme Court. The law was held to be unconstitutional on the ground that it infringes the right of parties to make reasonable contracts in the management of their own business.

Next is Palmer v. Tingle, 55 Ohio St., 428. In this case the mechanic's lien law of April 13, 1894, was held to be unconstitutional and void, in so far as it gives a lien on the property of the owner to subcontractors and laborers, and those who furnish machinery or material to the contractor. The syllabus is as follows:

"1. The inalienable right of enjoying liberty and acquiring property, guaranteed by the first section of the bill of rights of the constitution, embraces the right to be free in the enjoyment of our faculties, subject only to such restraints as are necessary for the common welfare.

"2. Liberty to acquire property by contract, can be restrained by the general assembly only so far as such restraint is for the common welfare and equal protection and benefit of the people, and such restraining statute must be of such a character that a court may see that it is for such general welfare, protection and benefit. The judgment of the general assembly in such cases is not conclusive."

I will read from the opinion, page 440:

"The preamble to the constitution is as follows: 'We, the people of the state of Ohio, grateful to Almighty God for our freedom, to secure its blessings and promote our common welfare do establish this constitution.' It is worthy of notice that the constitution is established to secure the blessings of freedom, and to promote the common welfare. As the constitution must be regarded as consistent with itself throughout, it must be presumed that the laws to be passed by the general assembly under the powers conferred by that instrument, are to be such as shall secure the blessings of freedom and promote our common welfare.

"To make this more emphatic, the first section of the bill of rights provides that, 'all men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and seeking and obtaining happiness and safety.' And by the second section it is provided that 'all political power is inherent in the people. Government is instituted for their equal protection and benefit.'

"The usual and most frequent means of acquiring property is by contract, and one of the most valuable and sacred rights is the right to make and enforce contracts. The obligation of a contract when made and entered into, cannot be impaired by act of the general assembly.

"The word 'liberty,' as used in the first section of the bill of rights does not mean a mere freedom from physical restraint or state of slavery, but is deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare."

And the court go on to consider what power the legislature has in passing laws imposing restraints that are necessary for the common welfare.

"That such restraint of the right and liberty of contract is for the common public welfare, and equal protection and benefit of the people must appear, not only to the general assembly, by force of popular clamor, or the pressure of the lobby, but also to the courts, and it must be so clear that a court of justice in the calm deliberation of its judgment, may be able to see that such restraint is for the common welfare and equal protection and benefit of the people.

"The statute in restraint of the liberty to contract as to interest on money, is valid for the reason that all can see that it is for the common welfare.

"Many other like cases of restraint as to contracts are to be found in our statutes, but all of them, in so far as they are valid, depend for their validity upon the same principle. It was the infringement of the liberty of contract that induced this court in *State v. Lake Erie Iron Co.*, unreported, to hold the statute unconstitutional which required corporations to pay their employees at least twice each month."

Next and last is *Wheeling Bridge & Terminal Railway Co. v. Gilmore*, 4 Circ. Dec., 366. In this case it was held that so much of the act of March 26, 1890, as amended, which declares that ten hours shall constitute a day's work, and that the employees therein named shall be paid for every hour in excess of ten which they shall be required or permitted to work, in addition to their *per diem*, is in conflict with secs. 1 and 19 of art. 1 of the constitution of Ohio, and of sec. 1, art. 14 of the amendments to the constitution of the United States, and is void. I will read from the opinion of the court, beginning on page 370:

"The liberty of making contracts is absolutely essential to the acquisition, possession and protection of property.

"The doctrine is generally recognized and enforced, that every person living under the protection of the general government has the right to follow such occupation or industrial pursuit as to him seems fit, provided it is not injurious to the morals, health, safety or welfare of the public; and such persons generally are entitled to the equal protection of the laws in respect to person and property; and as incident thereto, the right to employ labor, make contracts in regard thereto upon such terms as may be agreed upon by the parties, and to enforce such contracts when made. And the same is true of private corporations, with respect to the business they are chartered to engage in.

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"A person may, therefore, lawfully acquire property by his own labor, or by contract from the labor of others; and, within the limits and restrictions mentioned, no state can prevent him.

"In the case at bar, we have a company attempting to lawfully acquire property through the labor of others—making profit out of the labor of its employees, as well as out of its equipment and materials. Its equipment and materials are nothing if it has no servants to perform service for the public; so that the servant enters largely into the question of profits and the acquisitions of property by the company.

"It has the right to make contracts with its employees, who are *sui juris*, in such way as that it may profit from their labor, and on such terms as they can mutually agree upon, not contrary to public policy or the police laws of the state.

"The claim here is, in substance, not that the contract actually made in and of itself is unreasonable, but that it is made unreasonable because absolutely prohibited.

"We may concede the right of the legislature to prohibit unreasonable contracts, yet it would be for the courts to determine whether the contracts were unreasonable in fact, but the power to declare what contracts are reasonable, and what unreasonable, or, to prohibit absolutely, such as did not meet with the approval of that body, is an essentially different affair; and if that power was vested in the legislature, it would be without limit, and the judicial department could not interfere. That would be despotism pure and simple. Questions of power do not depend on the degree to which it may be exercised. If it may be exercised at all, it must be exercised at the will of the body in whom the power is vested.

"We do not doubt the authority of the legislature to forbid a railroad company from requiring any of its servants engaged in running its trains upon the road, or telegraph operators in active duty at its stations, who have worked in their respective capacities for twenty-four consecutive hours, to again go on duty until they have had at least eight hours' rest, as that would be a wise police regulation; nor have we reason to doubt the constitutionality of statutes prohibiting the employment of minors under 18 years of age, and women in certain employments for more than ten hours per day; and if the act under consideration provided that ten hours a day should constitute a day's work, unless otherwise agreed, as in sec. 4365, Rev. Stat., no question could be made of its constitutionality, as then the liberty to contract would be reserved to the parties. But the absolute prohibition in this act is of that paternal class of legislation, and legislation for a class, that destroys alike the constitutional guaranties of liberty of action, the security of property, and equal protection of the laws—an infringement at once of the rights of the employee as well as those of the employer. To annul such right and compel the company to pay more than the stipulated price per

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day after performance of the work and payment according to the contract, is not only a direct infringement of the constitutional right of acquiring property, but equally is it an infringement of the right to possess and protect property, of the guaranty of its inviolability and its security against appropriation to another's use without compensation."

In view of these decisions and many more to the same effect, which I have examined, I can come to no other conclusion than that a law which makes it a crime for an employer to discharge an employee when the employment is at will, and thereby requires him against his will to retain the employee in his service, directly infringes the constitutional guaranties heretofore quoted.

The right to employ labor and make contracts in relation thereto, upon such terms as may be mutually agreed upon, is incident (as all authorities agree) to the right of enjoying liberty and of acquiring, possessing, and protecting property, guaranteed by the constitution. An essential element of the right to enter into a contract of employment is the right of the parties to fix the terms of the employment, and of either party to terminate the employment at pleasure, when it is not otherwise agreed upon. When the constitution declares that every person has an inalienable right to liberty and to acquire, possess, and protect property, it guarantees to him the right to make and enforce all proper contracts, and to employ in carrying on his business such persons and such lawful means as he may choose, free from all restraints except such as are necessary for the common welfare.

If a law is constitutional which requires an employer against his will to retain an employee in his service, then a law which requires an employee against his will to remain in the service is constitutional. Neither of these positions can be sustained. "The constitutional provisions (and I now quote from the brief of counsel for the state) are universal in their application, and comprehend all persons within their scope, and guarantee the same rights and immunities to the employer and the employee." When a contract of employment is made which is terminable by either party at will, the employee may quit the service when he pleases, whatever may be his reason, and however harmful to the employer's interest his action may be, and thereby no right of the employer is violated. The employer is entitled to the same protection; no greater and no less. A law which prohibits an employer in contracting for labor from reserving the right to discharge his employee at pleasure, or having reserved such right prohibits him from enforcing it, directly infringes his right of liberty to contract.

In the right of personal liberty and liberty to contract, there are necessarily implied the right of the employer to discharge and refuse longer to employ a member of a labor union, and the right of the member of a labor union to quit the service of his employer and refuse longer to work for him, and neither is under obligation to satisfy the other

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that the reason for his action is a good one. If the employer can be required by law to retain in his employment one who is a member of a labor union, then he can be required by law to employ only those who are members of labor unions. Once admit that the legislature has the power to restrain the individual from conducting his business in his own way, when such restraint is not required for the public welfare, then there is no limit to the restraint which can be imposed; and that, as said by one of the authorities cited, would be "despotism pure and simple."

The law in question cannot be sustained as a valid exercise of the police power of the state, because the matter involved does not in any way affect the public welfare, health, safety, or morals. Indeed, such a claim is not made, and it is therefore not necessary to discuss it.

In no sense is the exercise by the employer of his constitutional right to employ and retain in his employment such persons as he may choose and as are willing to work for him, an interference with the right of the employee to belong to a labor union. In fact, when it is conceded, as I understand it to be in this case, that notwithstanding this law an employer may discharge his employee, when the employment is at will, for any reason, or without having or giving any reason it follows of necessity that a discharge for the reason that the employee belongs to a labor union, or for any other reason, is not wrongful.

I am clearly of the opinion that the law is unconstitutional, and for that reason the demurrer to the indictment is sustained, and the defendant is discharged.

Charles E. Sumner, William G. Ulery and Frank W. Mulholland,
for the State.

King & Tracy, for the defendant.

PARTNERSHIPS—EVIDENCE.

[Superior Court of Cincinnati, General Term, April, 1900.]

* MERCHANTS' NATIONAL BANK V. STANDARD WAGON CO. ET AL.

FACTS FAILING TO ESTABLISH PARTNERSHIP.

An association of corporations under the name of the Golden Eagle Buggy Company, without incorporation or partnership contract, each corporation advancing a certain sum of money for the purpose of enabling the association, conducted as a separate department of a buggy manufacturing business already established, to manufacture buggies for the associated corporations at cost price, plus ten per cent. for management—the buggies being sold to the corporations at arbitrary prices and the difference between cost price plus ten per cent. and selling price being rebated or paid upon annual accounting—does not show such a mutual agency, common ownership or profit sharing as is necessary to constitute a partnership.

JELKE, J.

The plaintiff in error, the plaintiff below, brought this action to recover a balance claimed to be due on a certain promissory note origi-

* For decision of special term, which this decision affirms, see 9 Dec., 380.

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nally made for \$4,287.22, dated May 23, 1893, and payable four months after date.

There was another note set out in the petition, which, for reasons developing at the trial below and satisfactory to the parties and the court, is dropped from our consideration.

Plaintiff alleges that sometime prior to the execution of the note aforesaid, the defendant companies, viz., the Standard Wagon Company, the Cook Carriage Company, the Davis Carriage Company, the Overman Carriage Company, Sechler & Company, the T. T. Haydock Company, the Emerson & Fisher Company, all corporations, entered into an association or partnership under the name of the Golden Eagle Buggy Company. Said note was executed by the Standard Wagon Company to the order of the Golden Eagle Buggy Company, and endorsed by the payee and discounted by the plaintiff.

The note is endorsed "The Golden Eagle Buggy Company, p. J. K. Reynolds," and none of the defendant corporations other than "The Standard Wagon Company" appear directly upon said paper in any way.

The liability of defendants herein must be that of general partners if any, as it does not appear that any of the defendants except the Standard Wagon Company knew of the making of this note, or in any way expressly authorized the making of the loan on its behalf, or received or used any of the money arising from the discount of this note.

It seems that Grant H. Burrows, being the president of the Standard Wagon Company, a corporation under the laws of the state of Kentucky, and engaged in the manufacture and sale of vehicles, conceived a scheme for the manufacture of a certain low-priced grade of buggy, to be supplied to the trade of Cincinnati, whereby the Standard Wagon Company and the other defendant companies herein would be enabled favorably to compete in the general market throughout the country in buggies of this kind, together with the product severally manufactured by each of them.

Mr. Burrows, for the Standard Wagon Company, proposed that it each of the other corporations would advance to his company the sum of \$4,000 to supply it with working capital, as the Standard Wagon Company did not have capital enough then in its business to embark in this new line of special manufacture, it would supply said corporations with buggies of this grade as they should require them at cost, plus ten per cent.

We find that this ten per cent. was to go to the Standard Wagon Company to compensate it for managing the business and to be its profit on its manufacture of said buggies, and that in addition to said ten per cent. it was to have the use of the other \$4,000 advanced by each of the other companies, which was in the nature of a call loan without interest from each of them respectively to the Standard Wagon Company.

This was an arrangement in which there were mutual advantages.

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Each of the companies, including the Standard Wagon Company, was enabled to procure buggies of this particular grade at a price consisting of actual cost plus ten per cent., plus the use of its \$4,000.

The Standard Wagon Company was enabled to embark in a new line of manufacture without using its own capital needed for its other business, and with a sure profit of ten per cent. on the buggies taken by the several companies under this agreement.

In regard to the number of buggies to be manufactured and sold or distributed, the agreement was very indefinite. The buggies were clearly the property of the Standard Wagon Company until they were ordered or bought by the other companies. No company was required to take a proportional part of the output or any special number of buggies, neither was the Standard Wagon Company bound to furnish any particular number on demand. In every respect, excepting as to price, the usual relations of seller and buyer seem to have existed.

The Golden Eagle Buggy Company was never incorporated, neither were any articles of association or partnership ever entered into or executed between the companies. The Standard Wagon Company merely set apart a portion of its plant and devoted it to the manufacture of these buggies, and for the purpose of keeping the accounts of this business and of accounting between the companies party to the arrangement, and more particularly for the purpose of furnishing the data from which to determine actual cost, the main feature of the whole scheme, kept in the name of the Golden Eagle Buggy Company a separate set of books.

The business became large and it was manifest that the companies could not buy or draw buggies without paying for them, but the difficulty arose on the payment of what price. Cost could not be ascertained except by periodic settlements which would naturally be annual.

In the meantime there must be some basis of payment; hence a tentative or provisional price was annually resolved upon. Prudence would dictate that such provisional price should be fixed slightly in excess of what actual cost would probably prove to be.

On the basis of such provisional price the companies paid for the buggies purchased by them sometimes by check, frequently by notes made to the order of the Golden Eagle Buggy Company, which notes were discounted in bank and the proceeds passed or deposited to the credit of the Standard Wagon Company.

There was an annual accounting, at which time actual cost was determined, and the difference between cost plus ten per cent. and the price paid rebated to each of the companies on all the buggies purchased by each of them respectively during the year.

It seems that Sechler & Company thought there was a partnership and that it would be liable on the outstanding obligations of the Golden Eagle Buggy Company as a partner. Sechler & Company also entered the rebates on its books as profits.

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This state of facts presents this question for consideration:

Eliminating for the purpose of this inquiry all question of their corporate powers, and treating the defendant companies as natural persons, were these defendants partners in this enterprise known as the Golden Eagle Buggy Company?

Plaintiff's counsel urges that the test of partnership is whether or not the business, enterprise or adventure is being carried on for and on behalf of the defendants as members and that the receipt of profits is cogent and significant evidence of this, citing *Wood v. Valette*, 7 Ohio St., 172:

"That a contract between parties to share in the net profits of a business, to the carrying on of which they respectively contribute, necessarily makes them partners as to third persons dealing with the firm."

The case of *Harvey v. Childs*, 28 Ohio St., 319, distinguishes *Wood v. Valette*, *supra*, and holds:

"Participation in the profits of a business, though cogent evidence of a partnership, is not necessarily decisive of the question. The evidence must show that the persons taking the profits, shared them as principals in a joint business, in which each has an express or implied authority to bind the other."

And on page 323 of the opinion:

"Where, therefore, as in the case of *Wood v. Valette*, 7 Ohio St., 172, and the later case of *Leggett v. Hyde*, 58 N. Y., 272, money is advanced, to be used in a trading business, and returned in a year with a share of profits made during that time, it may well be implied that the business was conducted on behalf and by the authority of the person advancing the money and sharing the profits, for it is to the continuing trade, in the ordinary way, that he looks for his profits.

"But such cases are plainly distinguishable from no where money is advanced, to be embarked in a single transaction, where one credit is contemplated. In such case there is no ground for the implied authority to incur debts, such as exists in regard to a general trading business. Add. on Cont., 161.

"In the case before us it is obvious that it was not contemplated in the arrangement between Childs and Potter that any indebtedness should be incurred in the purchase of hogs for the contemplated adventure, to which the whole business was to be confined. There is, then, no ground for the implication of authority from Childs to incur the debt in question. On the contrary, such implication is rebutted by the advancement of money to pay for all the hogs that were to come to his hands."

In *First National Bank v. Ballard*, 10 Circ. Dec., 298, the judges of the fourth circuit have recently said:

"The case of *Wood v. Valette* is still law in Ohio. It has not been overruled or modified by the case of *Harvey v. Childs*, 28 Ohio St., 319.

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"It is to be noticed that the circuit court in this case finds that the contract upon which defendants were held liable was within the scope of express agency.

"In *Cox v. Hickman*, 8 H. of L., 268, 303, Lord Cranworth, who delivered the principal opinion, says: 'The liability of one partner for the acts of his copartner is, in truth, the liability of a principal for the acts of his agent. * * * A right to participate in profits affords cogent, often conclusive evidence that the trade in which the profits have been made was carried on in part for or on behalf of the person setting up such a claim. But the real ground of liability is that the trade has been carried on by persons acting on his behalf; * * * that he stood in the relation of principal towards the persons acting ostensibly as the traders.' "

And on page 311 Lord Wensleydale said:

"The law as to partnership is undoubtedly a branch of the law as to principal and agent. Hence it becomes a test of the liability of one for the contract of another, that he is to receive the whole or a part of the profits arising from the contract by virtue of the agreement made at the time of the employment."

Also, see *Meehan v. Valentine*, 145 U. S., 611, 619-623, and *Slade v. Paschal*, 67 Ga., 541.

Referring, then, to the evidence in the case at bar, what does the evidence show as to the sharing of profits?

As we understand the agreement, the Golden Eagle Buggy Company, whatever it may have been, could have neither profit nor losses. The several companies were always to pay to the Golden Eagle Buggy Company account the same price at which these buggies were charged to the account of the Golden Eagle Buggy Company, viz., actual cost plus ten per cent., no more and no less. The books of the Golden Eagle Buggy Company served as a mere clearing house account.

At the annual clearing the money which stood as the difference between that paid into the Golden Eagle Buggy Company account by the companies and that charged to this account by the Standard Wagon Company was divided not equally, not on the basis of the \$4,000 advancements, not on the volume of business done by each or in a proportion theretofore agreed upon, but was rebated to the companies at so much per vehicle bought by them respectively during the year. We would not call this money so paid back "profits," and if we did, it would not be in the same sense in which that word is used in *Wood v. Valette*, and understanding it as we do, in the case at bar it can have no evidentiary value to establish the mutual agency which is the true and final test of partnership.

"If N furnished money to P to conduct business, and the latter was to let him have goods at cost prices, and nothing was said as to interest or profits and losses, this would amount to a loan, and would not con-

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stitute N and P partners." *Slade & Etheridge v. Paschal*, 67 Ga., 541.

Again, it does not seem to have been in contemplation of any of the parties except Sechler & Company that the Golden Eagle Buggy Company was such a legal entity as could borrow money; it was rather an account which could owe money to nobody other than the Standard Wagon Company. Hence, the idea of agency was never present.

The buggies when made never ceased to be the separate property of the Standard Wagon Company until actually purchased by the other companies, and at no time was the Golden Eagle Buggy Company possessed of assets which were the joint property of all the companies. No liability could be created for labor and material as against the defendants because all these things were to be furnished and the work done by the Standard Wagon Company which was to be paid cost plus ten per cent. by the defendants for such buggies as they saw fit to purchase.

As to the \$4,000 advancements it might well be said of these as was said in *Harvey v. Childs*, *supra*, the advancement of this money without interest would tend to rebut any implication of authority to borrow money.

We find, therefore, no mutual agency, no common ownership, and no such profit sharing as to necessarily make a partnership.

Having come to this conclusion on the facts, and being satisfied, regardless of the question of corporate powers, that a partnership did not exist, we prefer to let our decision of the case rest upon this finding, and do not go in the questions of corporate powers, *ultra vires* and estoppel, in regard to which we express no opinion.

Judgment affirmed.

Herron, Gatch & Herron, for plaintiff in error.

Lawrence Maxwell and Thornton M. Hinkle, contra.

CHARITABLE CORPORATIONS—NEGLIGENCE.

[Superior Court of Cincinnati, Special Term, May, 1900.]

EMMA L. CONNER v. SISTERS OF THE POOR OF ST. FRANCIS.

CHARITY HOSPITAL NOT RESPONSIBLE FOR NEGLIGENCE OF NURSE.

A corporation organized solely for the purposes of a charity hospital, having no capital stock and declaring no dividends, and using its income, derived from voluntary contributions, except in certain cases where a reasonable amount is charged for board, room and nursing to those who are able to pay, in the management of the hospital, is not liable for injuries to a pay patient through the negligence of a nurse, where it does not appear that the corporation was negligent in the selection of its servants.

SMITH, J.

The plaintiff in this case went to the hospital owned and managed by the defendant corporation for the purpose of having a surgical operation performed on her by her own physician, who was also a physician of

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the hospital. She engaged to pay the defendant \$10 a week for board and nursing during the time she was at the hospital.

The operation was successfully performed, and subsequently acting under the order of the physician, the nurse at the hospital undertook to apply hot water cans to her body for the purpose of preventing pneumonia from setting in after the operation. The application of the hot water cans was made while she was unconscious, being under the influence of an anaesthetic. It so happened, however, that one of the cans moved from position in which it was placed and inflicted a severe burn upon her, of which she was at the time unconscious.

She brings this action against the defendant corporation to recover damages for such burn on the ground that it was caused by the negligence of the nurse who was the employee and agent of the defendant; but does not claim that the corporation was negligent in the selection of the nurse.

It appears from the evidence, which is not disputed and is admitted to properly describe the nature of the defendant, that it is a corporation organized solely for the purposes of charity; that it has no capital stock, declares no dividends; that its income is used solely in the management of the hospital; that it has no surplus on hand; that its income is derived from voluntary contributions by various persons of money and supplies, and that it has about a dozen rooms which it rents out to those patients who are able to pay for the same a reasonable amount.

It is also not disputed that the hospital is open to all who apply for its benefits, so far as the accommodation of the hospital may allow.

There is no doubt that this corporation is a public charity, and is none the less so because of the fact that in certain cases it may charge a reasonable amount for room, board and nursing to those who, as is the case with the plaintiff, are able to pay the same. *Gerke v. Purcell*, 25 Ohio St., 229; *Humphries v. Little Sisters*, 29 Ohio St., 201.

Under these circumstances the great and overwhelming weight of authority is that even if it be admitted that the nurse was negligent in handling the hot water cans the corporation can not be held liable for such negligence.

The authorities seem to hold that such a corporation may be held liable for negligence in the selection of its servants or agents; but as no such negligence is claimed in this case, it is not necessary to express an opinion upon the question.

Upon the question whether the corporation is liable for the negligence of its servants, who have been selected with proper care, the defendant relies upon two cases, viz.: *Newcomb v. Boston Protective Department*, 151 Mass., 215, and *Galvin v. Rhode Island Hospital*, 12 R. I., 411.

The first case is not in point, for the reason that it was held by the court that the corporation there was not engaged in work of a public

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charity, but was "a private corporation carrying on business for the pecuniary benefit of its members, and incidentally helping others because it was impracticable to conduct its business without so doing."

It may be that the other authority, viz., the Rhode Island case, sustains the contention of plaintiff, although this is doubted in the following cases in which the Rhode Island case is referred to and disapproved of, viz.: *Fire Ins. Patrol v. Boyd*, 120 Pa. St., 624-650; *Ward v. St. Vincent's Hospital*, 23 Miscel. (N. Y.), 91-94; *Eva Joel v. The Woman's Hospital*, 96 N. Y., *supra*, 73-74; *Hearns v. Waterbury Hospital*, 66 Conn., 98.

But even if it be conceded that the Rhode Island case sustains the contention of plaintiff, nevertheless, as I have previously stated, the great and overwhelming weight of authority is in conflict with that case; and the cases of *Ward v. St. Vincent's Hospital* and *Joel v. The Woman's Hospital*, *supra*, are almost identical in their facts to the case at bar; in both cases the injuries suffered resulting from the alleged negligence in the use of hot water bags.

One of the latest cases on this subject is that of *Hearns v. Waterbury Hospital*, 66 Conn., 126. In deciding that the corporation was not liable for negligence in treating a patient, the court reviews elaborately all the English and American authorities on the subject. It states the reason of the rule in the following language:

"But the practical ground on which the rule is based is simply this: On the whole, substantial justice is best served by making a master responsible for the injuries caused by the servant acting in his service, when set to work by him to prosecute his private ends with the expectation of deriving from that work private benefit. This has at times proved a hard rule, but it rests upon a public policy too firmly settled to be questioned.

"We are now asked to apply this rule for the first time to a class of masters distinct from all others, and who do not and can not come within the reason of the rule. In other words, we are asked to extend the rule and to declare a new public policy and say: On the whole, substantial justice is best served by making the owners of a public charity, involving no private profit, responsible not only for their own wrongful negligence, but also for the wrongful negligence of the servants they employ only for a public use and a public benefit. We think the law does not justify such an extension of the law of *respondeat superior*. It is perhaps immaterial whether we say the public policy which supports the doctrine of *respondeat superior* does not justify such extension of the rule; or say 'that the public policy which encourages enterprises for charitable purposes requires an exemption from the operation of a rule based on legal fiction, and which, as applied to the owners of such enterprises, is clearly opposed to substantial justice. It is enough that a charitable corporation like the defendant, whatever may

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be the principle that controls its liability for corporate neglect in the performance of a corporate duty, is not liable on grounds of public policy for injuries caused by personal wrongful neglect in the performance of his duty by a servant whom it has selected with due care; but in such case the servant alone is responsible for his own wrong."

The following authorities, collected by counsel for defendant, in addition to those previously referred to, are to the same effect, or involve questions so kindred in their nature as to make their citation pertinent:

McDonald v. Mass. General Hospital, 120 Mass., 482; Gooch v. Association for Relief of Aged Women, 109 Mass., 558; Bentan v. Boston City Hospital, 140 Mass., 18; Van Tassel v. Eye and Ear Hospital, 15 N. Y. Supp., 620 and note; Perry v. House of Refuge, 63 Md., 20; Murtaugh v. St Louis, 44 Mo., 479; Eighny v. Railway Co., 98 Iowa, 588; Sherbourne v. Yuba Co., 21 Cal., 118; City, of Richmond v. Lang, Admr., 17 Gratt., 375; Pierce v. Union Pacific, 13 C. C. A., 323; Feoffees of Heriot's Hospital v. Ross, 12 Clark & Fin., 507; Williamson v. Louisville Industrial School, 28 L. R. A., 20 (Ky.); Am. and Eng. Ency. (old edition). Vol. 9, page 72, and note; new edition, Vol. 5, page 923, sec. 5; Shearman & Redfield on Negligence, 381; American Digest, Vol., 9, page 2251, sec. 108; Burwell on Personal Injuries, 2 ed. sec., 44b.

The jury will be instructed to return a verdict for the defendant.

J. R. Foraker and *Miller Outcalt*, for plaintiff.

Theodore Bruhl, for defendant.

SUPPLIES FOR COUNTY OFFICERS.

[Highland Common Pleas, March 16, 1900.]

* LYLE PRINTING CO. v. HIGHLAND CO. (COMR'S.)

1. CLERK CANNOT BIND COUNTY FOR SUPPLIES.

Under sec. 1264, Rev. Stat., providing that "the county commissioners shall furnish to the clerk all blank books, * * * blanks, stationery, and all things necessary to the prompt discharge of his duty, all which articles the clerk may procure, and shall be allowed for upon his certificate * * *" all the clerk has power to do is to select or procure such books and supplies as he may need, when, in the discretion of the commissioners as to the amount paid and whether the supplies are necessary, the bill may be allowed upon the clerk's certificate. There is no binding obligation on the county until the bill has been allowed by the county commissioners.

2. AUDITOR'S CERTIFICATE REQUIRED.

If such bill is allowed by the county commissioners, and it then becomes necessary to appropriate money for the payment thereof, the provisions of sec. 2834-B, Rev. Stat., requiring the auditor's certificate that the money is in the treasury to the credit of the fund from which it is to be drawn, or has been levied and placed on the duplicate and is in process of collection, and not appropriated, must be complied with.

WALTERS, J.

This case presents to the court questions as to the proper construction to be given to several sections of the statute as to the right of the

* This decision was affirmed by the circuit court, April 25, 1900.

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commissioners to allow and pay out of the county treasury bills growing out of contracts entered into by the several county officers for supplies, stationery, etc.

The bills for supplies in the several cases were procured by the several respective county officers for their use, and it is admitted that they are necessary for the proper conduct of their offices; but it is contended that these officers had no right to incur these bills; that it is the duty of the county commissioners to make all contracts for the purchase of supplies for each of the different offices, and that it was necessary before such contract is binding, and before the commissioners are authorized to direct the auditor to draw his warrant upon the county treasurer, that the auditor shall have certified under sec. 2834-B, Rev. Stat., that the money required for the payment of such obligation, arising from the contract, is in the treasury to the credit of the fund upon which it is to be drawn, or that the tax has been levied and placed on the duplicate, and is in process of collection, and not appropriated for any other purpose.

As to the county clerk's bill, the sec. 1264, Rev. Stat., has given the clerk larger authority in the purchase of supplies than any other county officer, and a disposition of the power of the clerk under that section will probably furnish a rule for an easy solution in respect to the other officers.

It is provided in that section that the county commissioners shall furnish to the clerk all blank books, stationery, etc., which articles the clerk may procure and shall be allowed for upon his certificate.

In *Ohio v. McConnell*, 28 Ohio St., 589, the court had there under consideration the construction of this statute as it then existed, and it declared that the clerk was not authorized by this statute to fix conclusively the amounts which shall be paid by the county for blanks or other things necessary to the prompt discharge of the duties of the officer. The statute then under consideration contained the words, "and paid for," immediately following the word "allowed," and that part of the section then read "and shall be allowed and paid for upon his certificate." Since that decision the words "and paid for," have been dropped from the statute apparently in conformity to that decision. And it would seem clear those words being dropped, and from the language used by the Supreme Court that now the clerk has less power, and that in reality all the clerk has power to do under this section is to select such books and supplies as he may need, that is procure them, but the county commissioners shall furnish; and that after his selection the bill shall be allowed for upon his certificate in the discretion of the board of county commissioners as to the amount to be paid therefor, and also, in the language of the statute, as to whether the different articles are necessary to the prompt discharge of his duty. In other words there is no binding obligation when the clerk procures these supplies until the bill is allowed by the commissioners, and when so allowed it becomes a

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binding contract on the part of the county, provided sec. 2834-B, Rev. Stat., has been complied with; and it would seem to the court plain, that if the bill shall be allowed by the county commissioners, and it then becomes necessary to appropriate the money for the payment of such supplies under the contract thus made binding, that that section should be complied with before a recovery can be had. The provisions of the section are sweeping, and the only exception is contained in sec. 894, Rev. Stat., where it is provided that no bill against the county shall be paid otherwise than upon the allowance of the county commissioners upon the warrant of the county auditor, except where the amount is fixed by law, or is authorized to be fixed by some other person or tribunal. And the Supreme Court have said the clerk is not authorized to fix the amount due for supplies he may procure; and therefore sec. 2834-B, Rev. Stat., would apply to the clerk as well as to all other county officers.

The circuit court in *State ex rel. Fanning v. Cuyahoga Co. (Com'r's)* has decided that the provisions of that section are mandatory.

Section 2834-B, Rev. Stat., as well as the section on the same subject with reference to municipalities, have each and both the object of rendering more effective the economical administration of the affairs of the respective officers, and the prevention of improvident contracts being entered into, and the statute made applicable to Cuyahoga county emphasizes this principle by requiring that the county officers on the first day of March of each year shall make out a list of office supplies and furnish the same to the county commissioners who will then advertise for bids for such material.

An entry will be furnished in conformity to this opinion.

H. A. Pavey, for plaintiff.

Oliver N. Sams, prosecuting attorney, for defendant.

SUMMONS—ERROR—APPEARANCE.

[Superior Court of Cincinnati, General Term, March, 1900.]

Smith, Dempsey, and Jelke, JJ.

CARRIE E. COWIE, EXRX., v. MEYERS ET AL., TRUSTERS, ETC.

1. SECTION 4987, REV. STAT., APPLICABLE TO PROCEEDINGS IN ERROR.

Sections 4987, Rev. Stat., providing that an action shall be deemed commenced, as to each defendant, at the date of the summons which is served on him or on a co-defendant, who is united in interest with him, is applicable, by analogy, to petitions in error.

2. SERVICE UPON ONE OF PARTNERSHIP DEFENDANTS IN ERROR.

The members of the Mt. Auburn & Avondale Land Syndicate, an unincorporated land syndicate, are members of a partnership, and therefore, since the

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members of a partnership are united in interest, the service of summons in error upon one of such members, saves the proceeding in error as to the other members not served, but the other partners should be served before the case is heard.

3. WAIVER OF SUMMONS AND ENTRY OF APPEARANCE BY ATTORNEY.

A waiver of summons and error, and entry of appearance by an attorney of one of the parties, is an entry and appearance of such party.

SMITH, J.

The plaintiff in error was plaintiff in the court below and brought an action against the trustees of an unincorporated land syndicate, of which Charles S. Cowie was a member. The defendants, George F. Myers, Robert Allison, and A. E. Burkhardt, were the trustees of the Mt. Auburn & Avondale Syndicate and the persons owning shares in the same. The petition alleged mismanagement by the trustees and illegal preferences by them in their dealings with certain of the members. The prayer for relief was for a dissolution of the company, an accounting by the trustees, the appointment of a receiver and master, the setting aside of the illegal preferences and for such further relief as the equity of the case demanded. The trustees and the members who were charged with having been given illegal preferences filed answers denying the material allegations of the petition. A large number of the members were in default for answer, and a number were not served because they were non-residents and without the jurisdiction of the court.

The case coming on to be heard upon the evidence the court dismissed the petition, whereupon the plaintiff filed a petition in error in this court.

A large number of the defendants, including the trustees, entered their appearance through counsel, but other defendants who are shareholders in the company, and who were in default for answer below, have not entered their appearance and no service in error has been had upon them.

The defendants in error who have entered their appearance have filed motions to dismiss the proceedings in error, for the reason that those defendants who have not entered their appearance and have not been served with summons are necessary parties to the proceeding in error, and that it is now too late to issue a new summons.

It is admitted by counsel for the motion that it is not necessary that the non-resident members of the syndicate should be brought into the case below, and therefore need not be brought into it in this court. *Homer v. Abbe*, 16 Gray, 543. The motion, therefore, is based upon the failure to make service upon all of those members of the syndicate who are within the jurisdiction of the court, and the question presented is, "whether a service upon part of the defendants saves the case as to all, or whether, on the other hand, the non-service upon part operates a bar as to all."

In *Buckingham v. Commercial Bank*, 21 Ohio St., 181, it was held that the provisions of sec. 20 of the code of civil procedure, now sec.

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4987, Rev. Stat., "that an action shall be deemed commenced, as to each defendant, at the date of the summons which is served on him or on a co-defendant who is a joint contractor, or otherwise united in interest with him, is applicable, by analogy, to petitions in error;" and it was therefore held in that case that the service of summons in error upon one defendant who was united in interest prevented the running of the statute of limitations as to all, and that service of summons could be had against those not served, even though such service as to them was not had until the time fixed by the statute of limitations had expired. This has been frequently followed by the Supreme Court and the principle it declares is now well settled in this state. *Sidener v. Hawes*, 87 Ohio St., 532, 544.

It was held in the special term of this court that the members of this syndicate are members of a partnership, and it is conceded by counsel for defendants that such is the relation between the members. *Hornier v. Meyers*, 4 Dec., 404.

We are of the opinion that the members of a partnership are united in interest, and therefore, that the service of summons in error upon one of the partners has saved the proceeding in error as to the others not served and that service of summons may be and should be had before the case is heard in this court; but that the motion to dismiss the proceedings in error should be overruled.

We are also of the opinion that by the waiver of summons and entry of appearance by Mr. Jonas B. Frenkel as attorney, Mrs. Fechheimer entered her appearance in this court.

John R. Sayler, Adam A. Kramer, Henry B. McClure and Jonas B. Frenkel, for the motion.

M. L. Buchwalter and M. F. Galvin, contra.

CONTRACTS—DAMAGES—VERDICTS.

[Hamilton Common Pleas, April, 1900.]

GRAND RAPIDS SCHOOL FURNITURE CO. v. ROBINSON.

1. BREACH OF CONTRACT FOR THE MANUFACTURE OF A SPECIFIED ARTICLE.

Where a contract is made for the manufacture of a specified article for which there is no market, in the ordinary legal sense of that term, and the manufacturer, after beginning work thereon, is notified by the customer that he will not carry out the terms of the contract, it is the duty of the manufacturer to go no further in the manufacture of the article, but to accept the breach and recover such damages as he has sustained.

2. CURING DEFECT IN VERDICT.

Admissions made by pleadings, proof taken by deposition, and the admission of the execution of the contract, are sufficient to cure a defect in the verdict caused by the failure of the jury to find that plaintiff was a corporation.

HOLLISTER, J.

1. The principle underlying the cases cited by counsel for defendant has no application to contracts calling for the manufacture of a

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specified article of a peculiar kind for which there is no market in the ordinary legal sense of that term, and when the time of performance by the manufacturer had arrived and the performance actually entered upon by him at the time the party for whom the article was being manufactured notified the manufacturer of his intention not to carry out the terms of its contract obligatory upon him.

Under these circumstances it is the duty of the manufacturer to go no further in making the article. It is his duty to accept the breach and proceed to recover such damages as he has sustained. To continue to manufacture and deliver the article under the terms of the contract and recover the contract price would result in no advantage to him but would increase the loss to the purchaser. The case is ruled by the principle found in *Clark v. Marsiglia*, 1 Denio, 317, illustrated by many cases, among which may be noticed *Gibbons v. Bente*, 51 Minn., 499; *Hosmer v. Wilson*, 7 Mich., 294; *City of Nebraska v. Coke Co.*, 9 Neb., 339; *Derby v. Johnson*, 21 Vt., 21; *Butler v. Butler*, 77 N. Y., 472; *Collins v. Delaporte*, 115 Mass., 159; *McPherson*, 40 Ill., 371; *Cort v. Railway Co.*, 17 Q. B., 127.

It is true that the plaintiff in express words declined to accept the breach; but notwithstanding what it said, it did in fact accept it, and stopped the work there before entered upon. In the meantime the defendant did not retract his repudiation of the contract, nor was his position at all changed by plaintiff's statement that it would not accept the preferred breach.

The difference between such a case as this and those in which the seller must either accept or reject a tendered breach, sue at once if he accepts, or perform under the terms of the contract, if he elects to keep the contract, alive both for his own benefit and the purchaser's, is expressly referred to in *Kadish v. Young*, 108 Ill., 170, a case much relied on by the defendant, and the distinction is clearly pointed out in *Hinckley v. Pittsburg Steel Co.*, 121 U. S., 264, at page 274, and in the opinion on the rehearing of *Davis v. Bronson*, 2 N. D., 300.

The motion of defendant for a judgment is overruled.

2. The material facts upon which to base a judgment for the plaintiff were found by the jury in their special findings of fact.

The admissions made in the pleadings, the proof taken by deposition prior to the amendment of the answer, the admission of the execution of the contract, are sufficient to cure any defect in the verdict caused by the failure of the jury to find that plaintiff was a corporation. *Studebaker v. Montgomery*, 74 Mo., 103; *Elektron Mfg. Co. v. Jones Bros.*, 4 Circ. Dec., 555; *Peckham Iron Co. v. Harper*, 41 O. S., 100, 106, 107.

The motion for a new trial is overruled, and plaintiff may take judgment.

W. T. Ritchie, for plaintiff.

C. B. Wilby, for defendant.

Meyer v. Lipski.

RELIGIOUS SOCIETIES—JUDGMENTS.

[Superior Court of Cincinnati, General Term, March, 1900.]

Jackson, Smith, and Dempsey, JJ.

*JOSEPH A. MEYER, ADMR., v. REV. LADISLAUS LIPSKI ET AL.

PERSONAL JUDGMENT—MEMBERS OF AN UNINCORPORATED RELIGIOUS SOCIETY.

A member of an unincorporated religious society who sues the other members on a note in which there is a clause pledging the property of the church in payment, is not entitled to a personal judgment against the defendant members nor to a decree declaring the debt a lien, but there must be a reference of the cause for an accounting and a finding as to the circumstances under which the church property was bound for the debt.

JACKSON, J.

This case was reserved to this court on plaintiff's motion for judgment on the pleadings.

The plaintiff seeks, as administrator of Valentine Bucheit, to recover from the defendants, as members of the congregation of the Polish Catholic Church of St. Stanislaus, on a certain promissory note for \$500, dated August 12, 1896. On said note there was paid by the church on December 9, 1898, the sum of \$100. The note declares on its face that all the property of the church is held for the payment thereof. The plaintiff therefore prays to recover from the defendants the sum of \$400, with interest, and also prays that he may be adjudged to have a lien on all the property of the church, and that said property may be sold to satisfy his claim.

An answer is filed by Rev. Ladislaus Lipski, the other defendants being in default. The answer is quite lengthy and is of such a nature that it is impossible to make a condensed statement thereof. Suffice it to say that in our opinion it does not set forth a matter of defense to plaintiff's action.

On the pleadings, we think the plaintiff is entitled to relief. But inasmuch as the defendants are members of an unincorporated religious society, of which the plaintiff's intestate was also a member, the plaintiff is not entitled to a personal judgment herein.

Inasmuch as the plaintiff's intestate as a member of such society must have received some part of the benefit arising from the money loaned to the congregation, the plaintiff must have an accounting in order to determine who are the members, and what proportion of the amount loaned, the members other than himself, must pay. This has been held in the case of German Catholic Church v. Kaus, 6 Ohio Dec. Re., 1028.

The plaintiff is entitled to an order of reference to determine this question, and also the question as to whether under the facts and circumstances the church property is bound for the payment of the debt.

W. M. Eames, for plaintiff.

E. C. Pocley, contra.

*For opinion of the superior court in special term in this case, see 8 Dec., 584.

RECEIVERS.

[Superior Court of Cincinnati, March, 1900.]

ROSA WEBER V. EDWARD A. NALTNER, ADMR., ET AL.

1. POSTPONEMENT OF CLAIMS BY RECEIVER.

A receiver cannot be compelled to postpone present claims, properly incurred by him, in order to meet old claims incurred under a prior receivership.

2. WHEN RECEIPTS OF PROPERTY ARE INSUFFICIENT TO MAINTAIN THE TRUST.

When the receipts of property under a receivership are not sufficient to maintain the trust, it is the duty of the receiver, for his own protection, to apply to the court for instructions, instead of voluntarily continuing the trust and allowing necessary claims to accumulate.

3. A RECEIVER SHOULD BE JUDICIOUS IN PAYING OUT PROFITS.

A receiver should not pay out money as profits arising from the receivership, without retaining a sufficient amount to meet future fixed charges and allowing for possible contingencies, such as a falling off of future receipts.

HEARD ON MOTION to require the present receiver to pay certain insurance premiums contracted by the previous receiver.

JACKSON, J.

In as much as there is at present no surplus in the hands of the present receiver out of which the old claims for premiums on insurance, which occurred under the prior receivership, can be paid, the motion must be overruled.

The present receiver can not be compelled to postpone present claims properly incurred by him in order to meet old claims incurred under the former receivership. Especially is this so, since in order to meet the old claims for premiums, the present receiver must neglect to pay the rent due the landlord, a claim for which he would be personally liable.

The personal liability of the receiver for rent under such circumstances is declared in *Cincinnati v. Goodhue*, 10 Ohio Dec. Re., 345.

When the receipts under the prior receivership were not sufficient to maintain the trust it was the duty of the receiver, for his own protection, to apply to the court for instructions, instead of voluntarily continuing the trust and allowing necessary claims to accumulate. Under no circumstances should the first receiver have paid to the plaintiff sums of money as profits arising from the receivership without retaining sufficient to meet future fixed charges and allowing for possible contingencies such as a falling off of future receipts.

If in the future there should be a surplus (after paying all necessary and proper charges) to meet this claim for premiums, a motion like the present one would be sustained. At present the motion must be overruled.

Clyde P. Johnson and Jones & James, for the motion.

William Worthington, contra.

Wentzel v. Zinn.

PLEADING—INTERROGATORIES.

[Hamilton Common Pleas, May, 1900.]

JOHN WENTZEL, GUARDIAN, v. ELIZABETH ZINN.

1. MATERIAL AVERMENTS—ENTIRE CAUSES—DEMURRER.

Material averments and entire causes of action can not be stricken out on motion. They must be met by demurrer or answer.

2. WANT OF KNOWLEDGE OF RECORD MATTERS CANNOT BE PLEADED.

A party cannot allege want of knowledge of matters of record. These should be ascertained and definitely set out.

3. RIGHT OF TRIAL BY JURY.

In the absence of defendant's admission that he has no defense, or where there remains a scintilla of proof in his favor, the court cannot strike the answer from the files as sham or frivolous, and thus deprive the party of trial by jury on the merits.

4. INTERROGATORIES CANNOT BE ANSWERED BY ATTORNEY.

Interrogatories attached to a pleading are required to be answered and verified by the party to whom they are propounded. They cannot be answered by his attorney.

PFLEGER, J.

Plaintiff sued to recover from the defendant, a doweress, the amount of taxes and assessment unpaid by her and to forfeit her life estate by reason of such non-payment. She answered, admitting specifically certain facts, denying certain allegations for want of sufficient information and defending on certain other grounds. Plaintiff moved (1) to strike out the entire answer after the first sentence in second paragraph as "irrelevant and immaterial," (2) to strike out the clause as to want of knowledge and sufficient information because it was "sham" and an abuse of the right, (3) to strike out the entire answer as to the second cause of action as "sham and false," and (4) to strike out the answers to the interrogatories because they were given under the oath of the attorney instead of the party and were not properly answered.

1. The first motion is directed against the entire answer as irrelevant. This is not the purview of a motion. Matters are relevant when they pertain to the cause of action or defense. *Fastnacht v. Stehn*, 53 Barb., 650; *Estee on Pleadings*, sec. 4459. Nor is it competent by motion to strike out material averments and in this way defeat a right of recovery. Such matters must be met by demurrer or answer, *Long v. Newhouse*, 57 Ohio St., 867. It is also evident that the matter sought to be stricken out together with that which would remain could be met by demurrer. Motion overruled.

2. Defendant answers that she is not informed of the amounts of taxes and assessments unpaid by her and set up in the petition, and, therefore, denies same. Technically, this defense is not a sham because "false," inasmuch as she may never have examined the records. Where a party is not chargeable with knowledge such an allegation is

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permissible. *Ohio v. Commissioners*, 11 Ohio St., 188; *McKenzie v. Ins. Co.*, 2 Disn., 228. Where, however, this knowledge is applicable to matters of record of which the defendant could have been informed, she could shield herself behind a failure to investigate. This is practically false. It is certainly evasive. In either case, it must be stricken out, *Bliss on Code Pleading*, sec. 421 and note, p. 642; *Ib.*, sec. 326; *Wertheimer v. Morse*, 10 Dec. Re., 814. Motion granted.

3. To strike out the entire defense to the second cause of action. When the defenses are clearly two separate and distinct causes of action a demurrer thereto would be proper, notwithstanding the rule that a demurrer, ordinarily good as to any part "within its four corners," is good as to the whole. Such a motion usurps the province of a demurrer. The ground that it is sham and false, because there was offered a letter written by an attorney representing defendant, which, in terms is inconsistent with her defense, is not well taken. In the absence of defendant's admission that she had no actual defense, or where there is but a *scintilla* of proof on her side, the court cannot weigh the testimony and dismiss her answer, as this would preclude a right to a trial by jury or on the merits before the court. The motion on this ground is not well taken and is overruled.

4. The motion to strike the answers to the interrogatories from the files because verified by the attorney, is answered by the defendant claiming that the interrogatories are demurrable and immaterial as they are for "fishing" purposes. Defendant has attempted to answer them and the rule in pleading applies, namely, that an answer waives the right to demurser.

Section 5099, Rev. Stat., provides that interrogatories "shall be plainly and fully answered under oath, by the party to whom they are propounded." Section 5101, Rev. Stat., makes these answers competent testimony against the party. Section 5102, Rev. Stat., for the verification of pleadings, provides that it may be done by the affidavit of "the party, his agent or attorney." Section 5109, Rev. Stat., providing that the attorney may verify the pleading if "founded upon a written instrument for the payment of money only," when such instrument in his possession, has been strictly construed by the Supreme Court in *Purdon v. Carrington*, 31 Ohio St., 168, and as not including a right to verify a pleading when based on a *mortgage*, because a mortgage is not a written instrument within the terms of that section. The same point was decided in *Kerns v. Roberts*, 2 Dec. Re., 587, in a well considered case, in which it is held that an attorney may verify a pleading for "the reasons, and no other, enumerated in the four specified classes of cases, and in those cases and no other." If the answers to interrogatories may be made by attorneys they might be made on mere "belief," and if the facts on the trial developed differently it could not serve the purpose designated by sec. 5101, Rev. Stat., such as non-

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suit, judgment by default or evidence against either party. In thus designedly omitting from sec. 5099, Rev. Stat., the right to verify interrogatories by an attorney, and in view of the strict constructions given to the rights of counsel to verify pleadings under sec. 5102 and 5109, Rev. Stat., it follows that we can not legislate into sec. 5099, Rev. Stat., and that an attorney has no authority to verify answers to interrogatories.

The motion is overruled on the first and third grounds and sustained on the second and fourth.

John Wentzel, for motions.

Aaron A. Ferris, contra.

MAYOR'S COURT—ERROR—BOND.

[Harrison Common Pleas, February Term, 1900.]

SCIO (VIL.) V. HARRY HOLLIS ET AL.

1. APPEARANCE BOND ON PETITION IN ERROR.

The mayor of a municipal corporation has no authority to take a bond and release the defendant from custody after conviction and sentence, except upon the order of the court of common pleas or a judge thereof, on granting the defendant leave to file a petition in error in said court.

2. PETITION TO RECOVER THEREON.

A petition to recover on a bond taken from such defendant by the mayor, after conviction and sentence for a violation of an ordinance, for the appearance of the defendant before the court of common pleas, must aver that such bond was taken pursuant to an order of the common pleas court or a judge thereof.

3. BOND TAKEN WITHOUT AUTHORITY.

A bond taken in a criminal case and approved by an officer without authority of law, does not constitute a common law obligation.

MANSFIELD, J.

In this action the plaintiff seeks to recover from the defendants the sum of \$300.00 on the following bond or undertaking:

State of Ohio, Harrison county, ss.

Be it remembered that on the 25th day of August, A. D., 1899, personally appeared, Harry Hollis and Mary Hollis and Paul O. Reyman by J. H. Garrison, his agent, and J. H. Garrison, and jointly and severally acknowledge themselves to owe the village of Scio, the sum of three hundred dollars (\$300.00) to be levied of their goods and chattels, lands and tenements if default be made in the condition following, to wit:

Whereas, the said Harry Hollis has given notice to the court of his intention to apply to the court of common pleas of Harrison county, Ohio, for leave to file a petition in error against the village of Scio to obtain a reversal of a judgment rendered against him in the mayor's court of the village of Scio, Harrison county, Ohio, on the 25th day of

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August, A. D., 1899, in a certain action on complaint of W. J. McCarty, wherein the village of Scio was plaintiff and the said Harry Hollis defendant.

Now the condition of the above obligation is such that if the said Harry Hollis will personally be and appear before the said court of common pleas of Harrison county, Ohio, on the first day of the next term thereof and from term to term until the case in error of the prosecution of which the said Harry Hollis has given notice, has been determined and will abide the judgment of the court and at no time depart without leave; then this recognizance shall be void, otherwise it shall be and remain in full force and virtue in law. (Signed) Harry Hollis, Mary E. Hollis, Paul O. Reuman, per J. H. Garrison, his agent, J. H. Garrison.

Taken, signed and acknowledged, by order of court on the day and year above written.

(Seal of Mayor, etc.) GEORGE O. CANAGA, Mayor.

The petition avers that said bond was duly approved by the mayor and said Harry Hollis, principal in the bond, released from custody pending proceedings in error of which he had given notice.

The petition also avers breach of conditions of the bond after affirmation by the court of common pleas.

Each of the defendants interposes a general demurrer, that the petition does not state facts sufficient to constitute a cause of action against him.

I think it sufficiently appears on the face of the petition that the bond was given in a criminal and not a civil case. Hence the statutes relating to bonds and recognizances in criminal cases need be looked to.

From the allegations in the bond it clearly appears that it was given *after* conviction and *after* sentence. It also just as clearly appears from the allegations in the bond that it was given *before* leave had been obtained from the court of common pleas to file a petition in error and *before* said court or a judge thereof had made an order fixing the amount of such bond. In other words the petition does not aver that said bond was taken pursuant to an order of the court of common pleas granting leave to file a petition in error and suspending the execution of sentence on the giving of a bond in such amount as fixed by said common pleas court.

Section 1752 Rev. Stat., provides that: A conviction under an ordinance * * * may be reviewed by petition in error; * * * but no such petition shall be filed except on leave of the court or a judge thereof, and such court or judge has power to suspend the sentence, as in criminal cases." Miller v. Bellefontaine, 1 Circ. Dec., 407.

The mayor, therefore, has not power to suspend the execution of his sentence, and it nowhere appears in the petition that the bond sued on

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was taken pursuant to a suspension by the court of common pleas, or a judge thereof as provided by sec. 1752, Rev. Stat., On the contrary it does appear from said petition that the mayor suspended the sentence when it avers that after the approval of the bond, the defendant "was thereby released from custody pending said proceedings in error of which he had given notice."

To determine how a court or judge may suspend the sentence of a mayor "as in criminal cases," we must look to the criminal code.

Sections 7321 and 7322, Rev. Stat., apply solely to the suspension of the execution of sentence of cases of conviction in the court of common pleas and do not apply to the suspension in error cases from inferior tribunals.

The recognizance taken on suspension under these sections is conditioned that the defendant shall appear at the next term of the court, or until the case in error is determined, and abide the sentence of the court.

Section 7356, Rev. Stat., provides that a conviction for a violation of an ordinance may be reviewed in the common pleas court.

Section 7362, Rev. Stat., provides for the suspension of the execution of sentence in error cases by the several courts in which such error proceedings may be pending. Under this section in felony cases the suspension is granted without reference to bail, leaving it discretionary with the trial judge, to admit the defendant to bail after order of suspension by the reviewing court. The provision in relation to bail, after suspension, became a part of this section in 1888.

Section 7363, Rev. Stat., provides that "No order of any court or judge suspending execution of sentence, in any case of misdemeanor, shall take effect until the defendant enters into a recognizance before the clerk of the court, or the officer before whom the cause was tried, in a sum to be fixed in such order, conditioned that the defendant will prosecute his petition in error to effect, and surrender himself to the custody of the proper officer of the county in which the conviction was had, in case the judgment against him be not reversed, or a new trial ordered."

Under this section the court or judge granting leave to file a petition in error, must in the order granting such leave, also fix the amount of the recognizance to be given by the defendant, and such order must also direct before what officer it is to be executed; whether before the clerk of the court or the officer who tried the case. See form of entry and bond on pages 567 and 568 of Wilson's Ohio Criminal Code.

It is apparent, therefore, that the right of the mayor to take the bond in question is purely statutory, and being such, the statute must be strictly followed.

This right to take a bond or recognizance after conviction and sentence depends entirely upon the order of the court or judge granting leave to file a petition in error and ordering a suspension of the sentence on the execution of a bond before the mayor in a sum to be fixed in such

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order. In the absence of such order, a bond taken by the mayor after sentence is void.

A petition to recover upon such bond will be bad unless it avers that such bond was taken pursuant to an order of the court of common pleas or judge thereof on the allowance of filing a petition in error in said court. *Seargent v. State*, 16 Ohio, 267; *State v. West*, 3 Ohio St., 509.

The condition of the bond sued on does not comply with sec. 7363, Rev. Stat., but, perhaps, this is not of much force under the provisions of sec. 7186, Rev. Stat., if the mayor was authorized by law to take it.

It is urged, however, that the bond is enforceable as a common law obligation, even if taken without statute authority, inasmuch as the defendant was released in consequence of the bond, and the obligors therein should be required to discharge their voluntarily assumed obligations.

In criminal cases there seems to be some difference of opinion as to whether a bond taken for a prisoner's appearance, without authority of any statute can be good as a common law bond.

In *Williams v. Shelby*, 2 Ore., 144, it was held that "where a committing magistrate took a bail bond in a criminal case where there was no law authorizing such a bond to be taken, the bond was void, both as a statute bond and as a common law obligation."

In *State v. Cannon*, 34 Iowa, 822, such a bond was held good because the defendant "having been released in consequence of the bond, there is no legal reason why the obligors thereon should not discharge their voluntarily assumed obligation." See also *Dennard v. State*, 2 Ga., 187, for like holding.

In *Dickinson v. State*, 29 N. W. R., 184 (Supreme Court of Nebraska), the second paragraph of the syllabus reads as follows: "A recognizance of the appearance of an accused person to answer to an indictment for felony, taken before and approved by an officer or person unauthorized by law, or where, under the facts of the case, the taking thereof is unauthorized by law, so that the same fails to be binding under the statute, held, also, to be void as a common law obligation."

But whatever may be the holding in other states, there is no doubt as to the ruling in this state. *Seargent v. State*, 16 Ohio, 267. In *Powell v. State*, 15 Ohio, 579, it was held that "during the term of the court of common pleas, a single judge of that court has not power to let to bail a person in custody charged with a criminal offense. A recognizance thus taken is void."

On page 581, Judge Read says: "It may be said, that although not a statutory recognizance, it may take effect as a common law bond.

"In matters of criminal procedure, the law tolerates no mongrel of this sort. * * * The object of the state is not money, but to secure the punishment of crimes. * * * How this is to be done is prescribed. It cannot be done by the act of the party himself, or in any

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mode but the one pointed out by statute. If not done rightly, and the person is discharged, it may be treated as an escape, and the person reimprisoned. If the recognizance taken is not a recognizance, it is nothing at all; it binds nobody, and secures to nobody any new right. Hence it is without consideration or power in any sense, and would have nothing to give it effect even at common law."

In State v. Clark, 15 Ohio, 595, it was held that: "A recognizance to let to bail on the allowance of a writ of error, after conviction, is not authorized by the act allowing writs of error in criminal cases, and is therefore void."

On page 598 Judge Read says: "If the judge directing the recognizance had no power to let to bail, it is void. * * * If the recognizance is not good as a statutory bond, it is not good at common law. * * * For the power to bail, and its mode of exercise, we look to our own constitution and laws. Although the jurisdiction and power of the court is conferred by the constitution, it is to be exercised in the mode pointed out by the statute. * * * The act allowing writs of error in criminal cases directs a suspension of execution in capital and penitentiary cases, * * * but in all other cases makes the suspension of execution to depend upon entering into a recognizance, conditioned to prosecute his writ of error to effect, and to surrender himself to the sheriff of the county in which conviction was had, unless the judgment be reversed and a new trial ordered. The statute, then, has directed the mode and incidents of the application and allowance of a writ of error in criminal cases. * * * After conviction, it depends upon the statute whether they shall be let to bail or not. In this case, the act not authorizing bail, the judge had no power to direct recognizance, and it is therefore void."

Since this decision the law has been amended so as to empower the trial judge in all cases of conviction for felony, except for murder in the first and second degree, to let to bail, where sentence has been suspended. Section 7362, Rev. Stat.

For other authorities bearing upon the questions involved see: Bird v. Cincinnati, 9 Dec. Re., 301; Weber v. State, 58 Ohio St., 616; 14 Am. Dec., 101; 2 Am. & Eng. Ency., 11, note 1.

The several demurrers will, therefore, be sustained and the petition of the plaintiff dismissed, unless leave to amend is desired.

D. A. Hollingsworth, for plaintiff.

Driggs & Heinlein and *Howard & Handlon*, for defendants.

MUNICIPAL CORPORATIONS—APPROPRIATING ORDINANCES.

[Superior Court of Cincinnati, General Term, May, 1900.]

Smith, Dempsey, and Jelke, JJ.

CINCINNATI V. BOARD OF CITY AFFAIRS, ET AL.**1. APPROPRIATION—INVALID FOR PAYMENT FOR CONTRACT WORK.**

Under an appropriating ordinance, in a city of the first grade, first class, containing the following item: "For Main Pipe Extension: Salaries and wages \$5,000; material and supplies, \$9,200," the work of laying main pipe could not be done by one who undertakes to do a certain amount of work for a fixed sum, over which work the city authorities would have no power except to see that the terms of the contract were complied with, because money so paid is neither "salary" nor "wages."

2. SAME—ALSO INVALID AS TO PAYMENT FOR MATERIAL.

Nor could the material and supplies be paid for under the ordinance in question, inasmuch as they are not bought by the city by direct and independent contract, but are included in and to be paid for with the completed job.

3. GOOD FAITH AND SAVING TO THE CITY, IMMATERIAL.

The mere fact that city officials effected a saving to the city by the adoption of the method of contracting above set forth, would not make an act valid which the law declares is invalid or authorize payment under the ordinance in question.

SMITH, J.

The petition in this case after making the necessary preliminary allegations, further alleges that the board of city affairs pursuant to advertisement, did on October 3, 1899, receive certain bids for the laying of water pipes on certain streets in the city of Cincinnati; that among said bids was one of Wiese & Hanley in which the said firm bid for labor furnished in laying sixteen inch pipe, 1800 feet, forty-three cents per lineal foot, and for labor furnished in laying four inch pipe, 200 feet, twenty-three cents per lineal foot; and for material in laying sixteen inch pipe 1800 feet, twenty cents per lineal foot, and for material in laying four inch pipe 200 feet, twenty cents per lineal foot. The computation made the bid to be for the sum of one thousand two hundred and twenty dollars. Thereupon said board passed a resolution awarding the contract for said work to said firm of Wiese & Hanley.

Among the bids received for laying water mains on certain other streets was a bid of Henkel & Brother in which said firm bid for labor furnished in laying six inch pipe 3,000 lineal feet, twenty-four cents, per lineal foot; for labor furnished in laying four inch pipe 800 lineal feet, twenty-four cents per lineal foot; for material furnished in laying six inch pipe 3,000 lineal feet, one cent per lineal foot; for material in laying four inch pipe 800 lineal feet, one cent per lineal foot. The computation made the bid to be for the sum of eight hundred and twenty-five dollars.

Thereupon said board awarded the contract for said work to said Henkel & Brother.

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The plaintiff complains with respect to these contracts, that unless restrained by the court the officials of the city will execute them and pay for the same out of the city treasury, and that such action will be illegal for the reason that there is no money in the treasury of the city to the credit of the waterworks fund not appropriated for other purposes than that required for the said contracts.

The defendant has filed an answer admitting the execution of the contracts but denying that there is no money in the treasury appropriated for the payment of such contracts.

The appropriation ordinance to defray the salaries and current expenses of the city of Cincinnati for the six months ending December 31, 1899, provides for a special fund known as the waterworks fund, and it is conceded by counsel for defendants that these contracts cannot be paid out of said fund unless from that part of the fund designated as follows:

FOR MAIN PIPE EXTENSION.

Salaries and wages.....	\$5,000.00
Material and supplies	9,200.00
Total.....	\$14,200.00

The contention of plaintiff is that no payment can be made from these appropriations in payment of a contract made to do the labor and furnish the material in the laying of water mains, unless such contract is a contract to pay for the labor by paying either a salary or wages and to pay for the materials and supplies by a direct and independent contract of purchase of them; that the payment of a contractor who agrees to do the work at a certain fixed price is not the payment of either salary or wages.

In the decision of Ampt v. Cincinnati, 8 Dec., 475, and Stem v. Cincinnati, 9 Dec., 45, I had occasion to examine the statutes with respect to the necessity of all expenditures of the city being preceded by a proper appropriation, and it is not necessary to repeat what was there said.

It is well settled too now, that a strict construction is placed upon these statutes, which require appropriations to precede expenditures as well as those known as the Burns and Worthington laws, which require that before any contract is entered into, there shall be attached a certificate of the city auditor that there is money in the treasury which may be used for the specific purpose designed: Secs. 2699 and 2708, Rev. Stat.; The city of Lancaster v. Miller, 58 Ohio St., 575; Buchanan Bridge Co. v. Campbell, 60 Ohio St., 406.

The execution of these contracts would not be the expenditure of money for wages, or salary for the reason that money paid to a contractor who undertakes to do a certain amount of work for a fixed sum over

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which the person contracting has no power except to see that the terms of the contract are complied with is not money paid either for wages or salary.

The principle is clearly stated in 12 Am. and Eng. Enc. Law, 186, where it is stated that "By the weight of authority these items (wages and salaries) mean the compensation due or paid to a hired person for his services and cover any earnings of mere servants or employes, but they do not cover the earnings of independent contractors or persons carrying on an independent business for themselves. See also Lang v. Simmons, 64 Wisc., 525; Hurd v. Krumer, 73 Miss., 177, 55 Am. St. Rep. 520; Riley v. Warden, 2 Ed., Ch. 58; Steeman v. Barrett, 2 H. & C., 984; Kampfield v. Lang, 25 Fed. Rep., 128; In Re Thomas H. Rose, before L. F. Hunter, Referee in Bankruptcy, 1 Bankruptcy Cas., 000.

The other item of the contract is claimed to be the purchase of material.

It will be observed, however, that the contract does not provide any rate for material as material but only a rate for "Material in laying, etc."

It seems to me the criticism of the corporation counsel is sound when he says "The iron castings used in laying water mains are not bought by the city under this contract as castings, nor are they as castings paid for by the city. They are paid for as pipe laid in the street. It is apparent that under this contract the title to these castings does not pass to the city as they lie in bulk, but only after they have been placed in position and can be measured there by the lineal foot. It is evident that this is not a contract for the purchase of those materials, but is a contract for the payment for a completed job and an attempt to divide that payment speciously to produce an apparent conformity to the appropriations."

For the reasons stated I am of the opinion that these contracts cannot be paid from the appropriations contained in the appropriating ordinance and designated under the head of waterworks fund as "Salaries and Wages" or "Material and Supplies" and, therefore, that they cannot be paid at all and the temporary injunction heretofore issued with respect to them must be made permanent.

The city officials state that by the adoption of the method of contracting for the work which they followed, a saving to the city is effected. And that they have had in mind in making these contracts only the best interests of the city.

I have no doubt that the city officials had at heart only the best interests of the city, but good intentions cannot make an act valid which the law declares is invalid, and if it is desired in the future to do work of this character by the contract system, the appropriating ordinances must be drawn in such a way as not to forbid it.

E. G. Kinkead, corporation counsel, for plaintiff.

Otto Renner, for defendant.

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NUISANCES—INJUNCTIONS.

[Superior Court of Cincinnati, General Term, March, 1900.]

Dempsey, Smith, and Jackson, JJ.

GEORGE SHAW V. QUEEN CITY FORGING CO.

1. RULE WITH REGARD TO ALL NUISANCES.

The rule with regard to all nuisances is, that the injury occasioned thereby must be real and substantial, and such as impairs the ordinary enjoyment, physically, of the property within its sphere. Thus, where the effect of vibrations, caused by the use of drop hammers in a factory, when it reaches residences in the neighborhood, is so slight as to be almost imperceptible, no action lies therefor.

2. TEST AS TO WHETHER NOISES CONSTITUTE A NUISANCE.

In deciding whether noises constitute a nuisance, the test is whether the noise is of such a character as would be likely to be physically annoying to a person of ordinary sensibilities, or whether the trade out of which such noise arises, is carried on at such unreasonable hours as to disturb the repose of persons dwelling within its sphere; and regard must also be had to the quality as well as to the quantity of the noise.

3. OPERATION OF DROP-HAMMERS—A NUISANCE.

The operation of drop-hammers in a factory in a residence neighborhood results in a degree and kind of noise that would be productive of actual physical discomfort and annoyance to a person of ordinary sensibilities.

4. OPERATION OF FACTORY AT NIGHT—A NUISANCE.

There is a time for work and a time for rest and where one seeks to work all the time, to the discomfort and disquietude of his neighbor and to a deprivation of the natural rest to which the neighbor is entitled, as by the operation of a factory, in a residence district, both night and day, there is a material interference with the neighbor's rights, for which he is entitled to a remedy.

b. INJUNCTION MAY BE APPLIED FOR AT ONCE.

Where a nuisance is sought to be enjoined, and the injury complained of is the destruction of the comfortable use and enjoyment of plaintiffs' homes, by reason of noises resulting from the operation of machinery by defendant, it is not necessary that the plaintiff, before applying for equitable relief, should establish his right by an action at law.

6. ACTION TO ENJOIN A NUISANCE—DEFENSE.

In an action to enjoin a nuisance, the defendant cannot avail itself of the fact that the plaintiff located in the vicinity subsequent to the establishment and operation of defendant's plant, when it appears that the nuisance complained of is caused by *increased* noises caused by a change of methods in operating the plant and made subsequent to plaintiff's location.

7. INVASION OF A SUBSTANTIAL LEGAL RIGHT.

Where a substantial legal right has been invaded, the court, in considering whether an injunction should issue, will not balance inconveniences, as to smallness of the damage on one side, or the magnitude on the other. This question is not, in such cases, a matter of special weight, and an injunction will issue regardless of consequences.

8. ISSUING OF AN INJUNCTION RESTRAINING A NUISANCE.

An injunction restraining a nuisance should be withheld for a reasonable time to give the defendant an opportunity to abate the nuisance if he so desires.

DEMPSEY, J.

Both of the cases of George Shaw v. Queen City Forging Co., and Stephen S. Mears v. Queen City Forging Co., being founded upon the same facts and seeking the same relief against the same defendant, are

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here on reservation from the court at special term for decision upon the law and facts. Both cases were tried together at special term upon the same evidence, and the decision upon that evidence and the law applicable thereto is to form the basis for the judgment of the court in each case.

The actions are for an injunction to restrain the continuation of an alleged nuisance. The petitions set forth that the defendant is a corporation doing business in Cincinnati, Ohio; that the plaintiffs are the owners, respectively, of certain real estate in said city of Cincinnati, known as Nos. 3844 and 3846 Dumont street, which real estate they now occupy and for a long period of time anterior to the suits have occupied as residences for themselves and families; that in the neighborhood of these dwelling houses there are a large number of other dwelling houses and there are no factories save the factory of the defendant hereinafter mentioned; that the defendant is the owner and operator, at the southwest corner of Dumont and Tennyson streets of said city, of a factory in which it carries on and has carried on the business of manufacturing carriage hardware and forgings; that said business has been carried on by the said defendant in such manner as not to be offensive or annoying to plaintiffs until January 30, 1899; that beginning on and ever since January 30, 1899, the defendant has changed its manner of doing business and its conducting its business of manufacturing carriage hardware and forgings by the use of heavy hammers and other noisy machinery which are used with great violence and frequency, and thereby has caused vibrations of the earth to take place and sundry great noises to continue and be kept up ever since that date, and has continued the same night and day without intermission except on Saturday nights, Sundays and Sunday nights, and thereby has done great damage to the dwelling houses of said plaintiffs, etc., which damage is estimated in each case at \$500. It is further alleged that the noises and vibrations aforesaid have interfered with the comfort of plaintiffs and their families in the occupation of said dwelling houses, making it difficult for the occupants of such houses to sleep, and making it uncomfortable and disagreeable to enjoy the ordinary use of said premises as dwelling houses and to pursue the ordinary occupations for which such residences are used, therein. An injunction is prayed perpetually enjoining defendant from operating its said factory at night, and that it may be enjoined from so conducting its business as to cause vibrations such as to injure the dwelling houses of plaintiffs, and that it may be perpetually enjoined from making such noises as to interfere with the comfort of plaintiffs in the occupancy of their dwelling houses or to annoy or interfere with them in the use thereof; and then follows a prayer for damages.

The defendant answers admitting the plaintiffs' respective ownership and occupancy of their dwellings; that there are a large number of dwellings in the neighborhood, and that it maintains and operates, as

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alleged, the factory for manufacturing carriage hardware and forgings. Defendant avers affirmatively that its conduct of its factory is such as not to be offensive or annoying to plaintiffs or any one else in that neighborhood, and then denies each and every allegation in the petition not specifically admitted. The defendant further avers that the site of its plant was, prior to 1879, for probably ten years, occupied as a planing mill, and since 1879 has been occupied and operated as a forge; that plaintiffs' houses are located on the opposite side of the Pennsylvania Railroad from defendant's forge and have been built since said forge; that there are other factories in the neighborhood, and that the same is a manufacturing neighborhood.

While the answer contains the averments last set out, most of which were admitted or sustained by the evidence, not much reliance or stress was placed upon them as matters of defense by counsel, for the reason most probably that the questions of law presented by them are now no longer mooted, and the adjudications have been invariably against the validity of the contentions implied in or to be inferred from the averments.

On the direct issues of fact in the cases a voluminous mass of evidence was taken, more than fifty witnesses having been sworn on both sides of the case. It is utterly impossible, and it very likely would be an unprofitable task to attempt to dissect or analyze this testimony in this opinion for the purpose of showing the basis upon which the court founded its conclusions as to the facts.

In addition to a careful consideration of the evidence all the members of the court made a personal visit to and inspection of all the properties involved in this controversy. After a review of the whole case the court has reached the following conclusions upon the facts:

1. That since January 30, 1899, the defendant has at times when the necessities of its business required it, operated its plant during the night-time, as set forth in the petitions, and that such operation has been to the material discomfort of the plaintiffs as well as others residing in the neighborhood of this plant. And from the testimony of defendant's officers it is a fair inference that hereafter, should the necessity arise, the operations of the plant at night would be repeated.

2. That in the operation of the plant, and especially in consequence of the manipulation of the drop-hammers employed therein, certain vibrations of the surrounding earth are produced which cause in turn a jarring and shaking of plaintiffs' premises; but in the opinion of the court the effect of these vibrations, when they reach the premises of plaintiffs, is so slight and almost imperceptible that they may be regarded as practically unsubstantial.

3. That by the like operations of the plant and manipulation of the drop-hammers, continuous, recurring noises are produced which materially interfere with the comfort and enjoyment of the plaintiffs in the

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use and occupancy of their said dwelling houses; and we are satisfied from the evidence that there has been, since the said January 30, 1899, a material increase in the amount and frequency of these noises, although we are not able from the evidence to point out with any certainty the extent of this increase.

Having reached these conclusions on the facts, several questions of law are presented with reference to the rights, liabilities and remedies of the respective parties arising under said facts.

The questions of law presented in the case have been exhaustively discussed by counsel, and a host of authorities recited to us on all of the points arising in the case. As we said before in regard to a discussion of the facts, so say we now, in regard to a discussion of the law and the precedents, that it would be impossible for us to make even an attempt at it in this opinion. We can only state the conclusions that we have come to after a careful review of the citations.

The first question presented is, to what extent must the inconvenience and discomfort produced by vibrations and noises go before they will come within the category of a nuisance as defined in the books? So far as the question in this case of the vibrations is concerned it may be dismissed from consideration; for the rule with regard to all nuisances is that the injury occasioned by them must be real and substantial, and such as impairs the ordinary enjoyment, physically, of the property within its sphere. *Wood on Nuisance*, 2d Ed., sec. 800. We have found as a matter of fact that the injury, discomfort or inconvenience, call it what you will, occasioned by the vibrations in this case are almost imperceptible and wholly unsubstantial, so that any relief based upon that ground alone would have to be denied.

As to the nightly operation of this plant there can be no great dispute about that. There is a time for work and a time for rest, and where one seeks to work all the time, to the discomfort and disquietude of his neighbor and to a deprivation of the natural rest to which the neighbor is entitled, there is a material interference with the neighbor's rights for which he is entitled to a remedy. See *Wood on Nuisance*, sec. 617.

As to a nuisance arising from noise, the solution is often a difficult one. The accommodation to each other of the various interests and personalities that thrive in a large city given over to mechanical, manufacturing and mercantile pursuits, makes it difficult to define within exact limits a rule that shall work absolute justice to all.

In *Gas Co. v. Freeland*, 12 Ohio St., 892, our Supreme Court held odor and smoke from a gas works being under discussion, that the amount of annoyance to constitute a nuisance can not be precisely defined; that the standard must be notions of comfort entertained by persons of ordinary susceptibilities and not by those of fanciful or fastidious tastes, nor by those not sensible of any annoyance.

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And this is practically the test applied to annoyances or inconveniences arising from noise. See Wood on Nuisance, sec. 617, where he lays down the doctrine that the test is whether the noise is of such a character as would be likely to be physically annoying to a person of ordinary sensibilities, or whether the trade out of which the noise arises is carried on at such unreasonable hours as to disturb the repose of persons dwelling within its sphere.

And in determining this question regard is to be had to the quality as well as to the quantity of the noise, for a noise may be comparatively slight and yet so affect the nervous system as to produce actual physical pain in persons of ordinary sensibilities. In Dittman v. Repp, 50 Md., 517, a like doctrine is set forth in these words:

"Noise alone, if it be of such character as to be productive of actual physical discomfort and annoyance to a person of ordinary sensibility, may create a nuisance and be the subject of an action at law or an injunction from a court of equity, though such noise may result from the carrying on of a trade or business in a town or city."

Many other decisions of like nature might be cited, but we consider these sufficient as indicating the test to be applied. And in its application to the facts in the case, we are constrained to say that the noise emanating from defendant's plant, in the operation of its drop-hammers, must be considered a legal nuisance.

The second question presented is the forum in which the remedy for the alleged nuisance must be sought, it being contended by the defendant herein that plaintiffs must establish their right to relief at law before equity will interfere by injunction, and reliance is had upon Goodall v. Crofton, 88 Ohio St., 271.

The facts in that case in brief were that a landlord, whose property rented to tenants for income producing purpose was being injured in its rental value by the operation of the defendant's steam engine and machinery in an adjoining marble yard, sought to enjoin the further use of said engine and machinery on the ground that, operated as they were, they constituted a nuisance. The court in its opinion says, that when the evidence in the case was applied to the pleadings and issues, it left no doubt in the minds of the court, but that the injury sustained by the plaintiff by reason of the alleged nuisance could be compensated in an action for damages; and that where a party has a plain and adequate remedy at law, and his right, as in this case, does not appear perfectly clear for equitable jurisdiction, the party will be required to first establish his right at law. See page 276.

This is undoubtedly the general rule, and it may have been and undoubtedly was rightly applied to the facts and issues as they appeared in the Goodall case. But this general rule is rather an elastic one and subject to certain broad exceptions.

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In the 14 Am. and Eng. Ency. of Pl. and Pr., under the title of "Nuisance," it is laid down that this general rule is much relaxed in modern times, and it is now the accepted doctrine that where complainant's right is clear and undoubted, and the injury is such in nature and extent as to call for interposition, injunction will be granted without requiring a previous resort to law. Thus, where a thing is a nuisance *per se*, or its contemplated use will necessarily make it a nuisance, or where the fact of its existence is undoubted, or where, from the nature of the case, an action at law can not afford adequate redress, no resort to law is required.

And under the last class of cases it is stated that equity will enjoin without first requiring the existence of the nuisance to be found at law, where the injury resulting therefrom is in its nature irreparable, as when loss of health, loss of trade, destruction of means of subsistence, permanent ruin to property, or the destruction of the comfortable enjoyment of a dwelling house, will ensue from the wrongful act or erection complained of.

In our own local courts the principle underlying these exceptions has been applied, as is well known to counsel, notably in what are known as the roller coaster case and the North Bend Coal Company case. The facts of the cases at bar make the principle of the exceptions applicable to them, for it is the destruction of the comfortable use and enjoyment of plaintiffs' homes that are involved; and so we hold that it is not necessary for plaintiffs in these cases to establish their claims at law before seeking injunctive relief.

Two other questions are made in these cases, which under the facts may be disposed of in a few words. One is that the plaintiffs, by building or entering into the occupancy of their houses after the defendant had long been in the occupancy and operation of its plant, voluntarily came to the nuisance and ought not now to be heard in complaint. Without passing upon the soundness of the alleged doctrine that one who goes to a nuisance is estopped to complain, it is sufficient to say that this doctrine has no application to the case at bar. The complaint is for an increase or aggravation of the noises and the running of the plant at night after January 30, 1899, it being expressly admitted in the petitions that prior to that date there was no annoyance caused to plaintiffs; that is, in effect, there was no nuisance prior to January 30, 1889. The nuisance consisted in the new or increased uses to which the plant was devoted after the above point of time, and the plaintiffs certainly did not move up to them.

The remaining point is as to whether it is the duty of the court to balance the inconveniences that may be caused to the several parties by the issuance or withholding of the writ prayed for in these cases.

The rule is laid down in Wood on Nuisance, sec. 802, that courts do not stop to balance conveniences; if a substantial legal right is invaded

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by the unlawful exercise of a trade or use of property by another, the smallness of the damage on one side, or the magnitude on the other, is not a fact ordinarily of any special weight, but if the right and its violation is clear an injunction will issue regardless of consequences.

On the whole case the court is of the opinion that the plaintiffs are entitled to an injunction perpetually enjoining the defendant from operating its plant in the night season—the term "night season" is to be construed reasonably, and is fixed by us as the period of time between 8 o'clock in the evening and 6 o'clock the following morning—and, also, that the plaintiffs are entitle to and injunction perpetually restraining the defendant at all times from so operating its plant and machinery as to produce noise therefrom in excess of the noise produced by said plant and machinery prior to January 30, 1899.

There may difficulties arise in the execution or performance of so much of the decree as pertains to the noises complained of, but those are difficulties that we cannot adjust now, but must leave for settlement when the occasion arises, if it ever should, over the enforcement of the decree.

An injunction absolutely prohibiting all noise we cannot issue, because plaintiffs by their petition solemnly admit that whatever noise there was prior to January 30, 1899, was not an annoyance to them; that there was noise of some degree prior to that date the very character and nature of defendant's plant itself implies. All that we can do is to confine the defendant's operation of its plant within the bounds admitted to be lawful and reasonable prior to January 30, 1899.

Courts of equity always permit a day of grace to a defendant before the issuance of an extraordinary writ, if it can be shown that, during the period of grace, a remedy other than the court's strong arm can be had for the grievances complained of.

It would be a great hardship to compel the defendant to close down its plant permanently in order to decrease the noise complained of herein. If, within a reasonable time, to be agreed upon by counsel or fixed by the court, the defendant company herein can and will so alter, rearrange or remodel their drop-hammers and the appliances connected therewith as that they will not further operate as a nuisance to plaintiffs, the injunctions herein granted will not be allowed to issue until the expiration of such time. If, however, the defendant does not propose and intend in good faith to make such effort, the injunctions will go into effect immediately.

A. W. Goldsmith and Geo. Hoadly, Jr., for plaintiffs.

W. A. Davidson and O. J. Cosgrave, for defendants.

PLEADINGS—ACTIONS.

[Superior Court of Cincinnati, Special Term, March, 1900.]

BARRON, BOYLE & CO. v. PITTSBURG PLATE GLASS CO. ET AL.

1. OBJECT OF RULE REQUIRING CERTAINTY IN PLEADINGS.

The object of the rule requiring certainty in pleadings is not infringed where the matter in reference to which the pleading is said to be uncertain, is peculiarly within the knowledge of the opposing party.

2. LESS CERTAINTY IN SETTING OUT MATTERS OF INDUCEMENT.

Less certainty is required in setting out matters of inducement, than in setting out the gist of the action; therefore, a plaintiff will not be compelled to set forth the names of individuals, copartnerships, and corporations, organized as a trust, under a certain name, for the purpose of "freezing" him out of a certain line of business.

3. UNCERTAINITY IN ALLEGATION—SUBSEQUENTLY EXPLAINED.

A motion to make an allegation more definite and certain will not lie where such allegation, though in itself uncertain, is explained in a subsequent part of the pleading.

4. ACTION UNDER PROVISIONS OF VALENTINE-STEWART ANTI-TRUST LAW.

In an action brought under the provisions of the Valentine-Stewart anti-trust law, for attempting to "freeze" the plaintiff out of business, the main *gravamen* of the complaint is the attempted destruction of plaintiff's business, sought to be accomplished by various means, which, by reason of the alleged conspiracy, are properly conjoined in one action, although, if used alone, each means would constitute a single cause of action.

5. AVEREMENT OF CONSPIRACY—ITEMIZING DAMAGES.

The averment of a conspiracy makes it possible to unite in one action, and as a single cause of action, claims for damages which would otherwise have to be sought in independent actions. Thus, threats, slander of business, unlawful solicitation of customers, etc., may be parts or elements of the charge of conspiracy or the attempted destruction of plaintiff's business. Therefore, a motion requiring plaintiff to itemize his damages should be overruled.

DEMPSEY, J.

The petition in this case seeks to recover \$50,000 damages, with two-fold penalty—damages the plaintiffs claim to have sustained in various ways by reason of a conspiracy entered into by defendant to "freeze" the plaintiffs out of the plate glass business. The petition is a very lengthy one, and the averments, probably from the necessity of the case, are intricate, involved and complex. To the petition the defendants have interposed various motions, which are disposed of here:

1. The defendants move that plaintiffs make their petition more definite and certain by stating the names of the several individuals, copartners and corporations, and their respective places of residence or their respective places of business, that plaintiffs claim have "organized as a trust by pooling * * * * under the name of the Pittsburgh Plate Glass Company," etc., and also when and in what manner and by what acts it is claimed said parties organized. This motion is overruled on two grounds:

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(a) Because these matters are pleaded by way of inducement, and not by way of *gravamen*, and less certainty is required in inducement than when the gist of the action is being set out.

(b) Because these matters, if true, are peculiarly within the knowledge of the defendants, and the object of the rule of certainty is not infringed when the defendant has knowledge in full of the facts.

2. Defendants move that there be stricken out of the petition as redundant and irrelevant matter, the paragraph beginning with the word "lastly" in line 10, on page 8, of the petition, and ending with the word "fit" in line 7, on page 4; or, in the event that the court shall refuse so to order, that then the court will order the plaintiff to make these averments more definite and certain in certain particulars.

Both motions, or phases of this motion, are overruled on the same ground that all the matter complained of is pleaded by way of inducement, as preliminary either by way of history or explanation of motive and intent, to the *gravamen* of the complaint set forth in the petition thereafter.

3. So much of third motion as seeks to compel plaintiff to state fully and specifically the "threat" referred to on page 5 of the petition, and also what was said in "slanderizing the business of the plaintiff," referred to on page 5, is overruled, for the reason that the subsequent averments, although very involved, are in reality an explication of the "threats" and "slanders" complained of. The rest of the motion being directed to mere matters of evidence is denied.

4. The fourth motion is overruled in both particulars. Under the circumstances alleged, the solicitation away of plaintiff's customers was an unlawful act; who these customers were, where they lived, etc., are matters of evidence, and in addition, peculiarly within defendants' knowledge and need not be alleged with more certainty.

5. The fifth motion as to itemizing the damages, I think, should be overruled, although it has given me some trouble in arriving at a conclusion.

The main *gravamen* of the complaint is the attempted destruction of the plaintiffs' business sought to be accomplished by defendants by various means, each of which means, if used alone, would constitute a single cause of action, but all of which, by reason of the alleged conspiracy or combination, are properly conjoined in one action.

The averment of the conspiracy makes it possible to unite in the one action and as a single cause of action, claims for damages which otherwise would have to be sought in independent actions. Now, while threats, slander of business, unlawful solicitation of customers, etc., are charged, they are all charged as parts or elements of the greater charge, viz., the intended destruction of the plaintiffs' business, and it seems to me they dovetail, by reason of the alleged conspiracy, so much one into another that it would be impracticable and impossible for a complainant

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to say how much he lost by one act or the other. It seems to me it is a question to be determined by the evidence, and not to be first settled in the pleading.

This motion will be overruled, exceptions of defendants may be noted and thirty days allowed to plead.

C. W. Baker and Herman Steinberg, for plaintiffs.

Lawrence Maxwell and Herbert Jenney, for defendants and motions.

GUARDIAN AD LITEM—ATTORNEY FEES.

[Superior Court of Cincinnati, Special Term, May, 1900.]

JOHN WORTHER V. EDWARD RUEHRWEIN ET AL.

1. GUARDIAN AD LITEM NOT ENTITLED TO ATTORNEY'S FEES AS COSTS.

A guardian *ad litem* in an action of tort cannot have an allowance made to him for attorney's fees to be taxed in the costs and paid by the opposing unsuccessful party.

2. ATTORNEY CANNOT SECURE FEE BY HAVING HIMSELF APPOINTED.

Nor can an attorney by having himself appointed guardian *ad litem*, secure compensation for his services, to be taxed as aforesaid, because such services are not those ordinarily incident to the office of guardian *ad litem* and cannot, therefore, be presumed to be within contemplation of the statute.

On motion to allow a guardian *ad litem* attorney's fees.

SMITH, J.

This was an action by the plaintiff against the defendants, Edward Ruehrwein and Elizabeth Ruehrwein, who are husband and wife, and their two minor sons, Edward Ruehrwein, Jr., and Frank J. Ruehrwein, to recover damages for an assault and battery upon the plaintiff.

Upon application of the defendant, Edward Ruehrwein, Dan Thew Wright was appointed guardian *ad litem* for the minor defendants, accepted the appointment and with D. H. Pottenger, another member of the bar, conducted the defense for all of the defendants.

The case was tried before myself and a jury. At the conclusion of the testimony of plaintiff a motion to arrest the case from the jury as to Edward Ruehrwein was granted; and the case proceeding as to the other defendants the jury returned a verdict in their favor. A motion for a new trial has been overruled.

A motion is now made by the guardian *ad litem* for an allowance of \$250.00, as fees for services as attorney for the minor defendants, to be taxed as part of the costs in the case which are to be paid by the plaintiff.

The question whether a guardian *ad litem* can have an allowance made to him for attorney's fees in an action at law—in tort—to be taxed in the costs and paid by the unsuccessful party is a new question in our courts so far as my experience or information goes.

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It is clear from the following sections of the Revised Statutes that if this allowance is made and taxed in the costs, it must be paid by the plaintiff.

Section 5348, Rev. Stat., provides that, "When it is not otherwise provided by statute, costs shall be allowed, of course, to the plaintiff, upon a judgment in his favor, in actions for the recovery of money only, or for the recovery of specific real or personal property."

And in sec. 5349, Rev. Stat., it is provided that "if it appears that a justice of the peace has jurisdiction of the action and the same has been brought in any other court, and the judgment is less than one hundred dollars, unless the recovery be reduced below that sum by counterclaim or set-off, each party shall pay his own costs; and in all actions for libel, slander, malicious prosecution, assault, assault and battery, false imprisonment, criminal conversation or seduction, actions for nuisance or against justice of the peace for misconduct in office, when the damage assessed is under five dollars the plaintiff shall not recover costs."

And sec. 5350, Rev. Stat., then provides that, "Costs shall be allowed, of course, to any defendant, upon a judgment in his favor in the actions mentioned in the two preceding sections."

The two sections of the Revised Statutes which relate to the defense of infants by guardians *ad litem* are sec. 5003 and sec. 5001.

Section 5003, reads as follows: "The defense of an infant must be by a guardian for the suit, who may be appointed by the court in which the action is prosecuted, or by a judge thereof, or by a probate judge."

Section 5001, reads as follows: "The court shall require a guardian *ad litem*, or a trustee appointed under the preceding section, faithfully to discharge his duty, and upon his failure so to do, may remove him and appoint another in his stead; and the court may fix a compensation for his services which shall be taxed in the costs against the minor or insane person."

The contention of the guardian *ad litem* in this case is based upon the last liens of sec. 5001, Rev. Stat., which I have italicized.

It is a familiar rule in chancery, in a certain class of cases, to allow attorneys' fees to be paid out of a fund under the control of the court. These cases are where one party has brought into court a fund which is to be distributed among a number of persons who belong to the same class. In such cases it is thought that the party who brought the fund into court should not be obliged to bear all the expenses incident to such a course. Without undertaking a complete enumeration of such cases, it will be sufficient for the purpose of illustration to refer to suits to assess stockholders' liability and suits to set aside fraudulent conveyances, in both of which classes of cases all the creditors are paid from the fund or property in court.

But the courts of common law never allowed attorneys' fees as part of the costs. Because at common law no right existed to recover any

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costs. This rule is recognized and declared in *Farrier v. Cairns*, Exrx., 5 Ohio, 46, in which it is said:

"It is equally certain that he had acquired no right to any judgment for costs. This must depend upon the statute law in force at the time judgment should be rendered. Costs are unknown to the common law. They are given only by statute and may be changed or entirely taken away at the will of the legislature."

The language of the statute, "compensation for his services," limits the compensation to services which the guardian shall render and does not authorize compensation for the services any other person may render; and therefore does not authorize payment for services rendered by an attorney for the infant or the guardian *ad litem*; and I do not think the statute can be made to cover such compensation by having the attorney appointed as guardian *ad litem*; because such services are not those ordinarily incident to the office of guardian *ad litem* and cannot therefore be presumed to be within the contemplation of the statute.

Furthermore, I think that an intention to make so radical a change in the common law as to impose the attorney's fees of the successful infant upon his unsuccessful opponent, should clearly appear from the statutes before it is conceded to exist.

The Supreme Court of Illinois, as late as the year 1894, had occasion to construe a statute quite similar to the one under consideration which had been enacted by the legislature of Illinois with respect to courts of chancery. The case I refer to is *Hutchinson v. Hutchinson*, 152 Ill., 858; and the statute under examination read as follows:

"In any cause in equity it shall be lawful for the court in which the cause is pending, to appoint a guardian *ad litem* to any infant or insane defendant in such cause, and to compel the person so appointed to act. By such appointment such person shall not be rendered liable to pay costs of suit, and he shall moreover be allowed a reasonable sum for his charges as such guardian to be fixed by the court, and taxed in the bill of costs."

In refusing to make an allowance to the guardian for the expenses of his attorney and the expert witnesses called by him, the court held that the statute properly construed would not warrant such an allowance. It declared that:

"It would be a heavy tax upon, if not a denial of justice to keep out of court, a citizen who is advised that he has a just ground for relief in equity, without he assumes a liability to pay the fees and expenses of the solicitors and experts employed by his adversaries, in all cases where one or more of the opposite parties in interest happens to be under full age."

This declaration applies with equal force to the construction of our statute contended for by the guardian *ad litem* in this case.

Werther v. Ruehrwein.

As no special services are proven by the guardian *ad litem* other than his services as attorney, I see no ground for an allowance other than that usually made to the guardian *ad litem*, viz: \$5.00 for each infant.

D. Thew Wright and D. H. Pottenger, for guardian *ad litem*.

G. R. Werner, for plaintiff.

CORPORATIONS—INTERROGATORIES.

[Superior Court of Cincinnati, Special Term, 1900.]

CARTER v. ENQUIRER CO.

INTERROGATORIES—NOT NECESSARY TO DESIGNATE OFFICER TO ANSWER.

In addressing interrogatories to a defendant corporation it is not necessary to designate by what officer of the company they shall be answered.

DEMURRER to Interrogatories.

DEMPSEY, J.

Defendant is a corporation, and demurs to certain interrogatories annexed to plaintiff's petition, because plaintiff does not designate by what officer of defendant company they shall be answered. After a somewhat extended examination of sec. 5099, of the code providing for such interrogatories, I am of opinion the demurrer ought to be denied.

The code as originally passed March 11, 1858, made no provision for interrogatories. See sec. 105, 51 O. L., page 74. In 1857 this defect, if defect it was, was cured by an amendment to sec. 105, which provided that such interrogatories might be annexed by any party, whether plaintiff or defendant, "in all cases in which he would have the right to use the deposition of an adverse party." 54 O. L., 28; S. & C., 982.

This limitation on the right excluded, as a necessary consequence, the right to propound interrogatories to corporations, because in the nature of things their depositions could not be taken and could not be used against them. To remedy this the legislature amended the act in 1873, 70 O. L., 54, so as to extend the right as against corporations. The qualifying clause that "if such party is a corporation," the answer under oath shall be "by the president, secretary or other officer thereof, as the party propounding requires," does not in my opinion limit the right to require answers only in cases where the opposite party designates an officer to answer.

The remedy for failure to answer provided for in sec. 5101 was part of original sec. 105, and one of the penalties was by attachment against a contumacious party. This remedy, of course, could not apply to the corporation itself, and, in order to make this remedy as effectual against corporations as against individuals, an election or choice was given to

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the interrogating party to select any officer of the corporation whom he could require to make answer. Any other construction of this section would deprive a party, where the very nature of the case would show the information sought to be in the position of the corporation, from obtaining the same unless he called upon every officer of the corporation from the chief down to answer the questions, and that would be so impracticable that it surely was not the intention of the legislature to enact such a rule. That it is entirely feasible and practicable to address interrogatories to the corporation itself and procure answers thereto is well sustained in the well considered cases of *Blair v. Railroad Co.*, 73 N. W., 1058, and *I. C. R. R. v. Sanford*, 75 Miss., 862.

The demurrer is overruled.

Alex Murry, for demurrer.

D. T. Wright, Jr., contra.

VERDICTS—NEW TRIAL.

[Hamilton Common Pleas, April, 1900.]

ANNA M. FLAGG v. KATIE SCHUBERT.

EXCESSIVE VERDICTS—UNAUTHORIZED INTERFERENCE.

Where a case is tried fairly, and nothing is said or done at the trial which would tend to inflame the minds of jurors, or mislead them, or cause them to view the facts in any other than an unprejudiced way, and the amount of the verdict is not so far out of the way as to indicate passion or prejudice, an interference by the judge on the ground that the verdict is excessive, is unwarranted although if the judge had sat as a juror he would not have agreed to so large a verdict.

In this case defendant is alleged to have used words reflecting on plaintiff's reputation for chastity. The jury returned a verdict of \$400 for plaintiff. Upon motion for a new trial the principal ground urged was that the damages were excessive.

HOLLISTER, J.

If the judge who presided at the trial of this case had sat as a juror his verdict would have been for the plaintiff, but he would not have awarded damages so large as the jury returned in their verdict. The jury was an unusually good one. The case was tried fairly. There was nothing said or done at the trial which would tend to inflame the minds of the jurors, to mislead the jury, or cause them to view the facts in other than an unprejudiced way. The amount of the verdict is not so far out of the way as to indicate that the jury were influenced by passion or prejudice or sympathy. Under these circumstances any interference by the court, substituting its judgment for the judgment of the jurors, would be unwarranted, a clear usurpation by the court of the functions of the jury. The motion for a new trial is overruled.

James N. Rampsey and James D. Ermston, for plaintiff.

Thomas F. Shay, for the motion.

In re Assignment of George Meyers.

BANKS AND BANKING—COLLATERAL SECURITY.

[Hamilton Insolvency Court, April, 1900.]

IN RE ASSIGNMENT OF GEORGE F. MEYERS.

1. RULE AS TO COLLATERAL LEFT WITH A BANK FOR A PARTICULAR PURPOSE.

Where collateral security is left with a bank for a particular purpose, the right of the bank to subject it is limited to the purpose for which it was received and the right of the bank to a lien for its general balance is excluded.

2. RULE APPLIED.

Where collateral is left with a bank as security for payment of a note, the bank cannot, upon renewing the note, credit the collateral against both the new note and other indebtedness of the maker to it, without the maker's knowledge or consent that the collateral is to be used as security for the other indebtedness; nor can the bank avail itself of the doctrine of set-off.

MCNEIL, J.

On November 8, 1897, George F. Meyers called at the National LaFayette Bank, of which bank he was a customer, with a note of that date for \$1,200, made by himself to his own order, payable fifteen days after date, to have the same discounted, and offered as collateral therefor a note made by A. S. Boyle to said Meyers for \$5,000, of date of June 12, 1896, payable three years after date. The bank through its president, Mr. Goodman, discounted the \$1,200 note and accepted the Boyle note as collateral, Mr. Meyers endorsing the same with lead pencil. At the end of fifteen days, when the note matured, Mr. Meyers called at the bank and renewed the note for fifteen days more. On December 8, when the note again matured, Mr. Meyers asked for a renewal of same for sixty days. Mr. Goodman was absent and Mr. Guthrie, vice-president of the bank, granted the renewal. Nothing was said at the time of either of the renewals about the collateral. Mr. Guthrie knew the collateral note was in the possession of the bank.

At the time the original \$1,200 note was discounted the bank held another note of Mr. Meyers' for \$1,700, endorsed by Meyers, Gibbs & Co., which note had been originally given for a larger amount, but during the course of several renewals had been reduced to \$1,700. This note would mature on December 30, 1897. When Mr. Goodman returned the \$1,200 note was "laid over" by him, and not entered on the "credit book" of the bank; and on the maturity and renewal of the \$1,700 note on December 30, 1897, it was laid over also, and both the notes were entered on the credit book of the bank at the same time, viz., January 5, 1898. Mr. Meyers was not informed of the fact that the notes were laid over, nor was the \$1,700 note mentioned to him, or in any way referred to, at the time the original \$1,200 note was discounted or on the occasion of any renewal thereof. On the credit book of the bank the \$1,200 note and its renewals are the only notes entered as having collateral security.

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On February 9, 1898, and before the maturity of these notes, Mr. Meyers made a general assignment for the benefit of his creditors to Drausin Wulsin, who, after he qualified as assignee, tendered the bank payment of the \$1,200 note, with interest, and demanded of the bank the collateral note for \$5,000 made by Boyle. The bank refused to accept the money and claims the right to hold the Boyle note for all the indebtedness of Meyers to it. Thereupon the assignee made application to this court for an order requiring the bank to deliver said Boyle note to him upon payment of the \$1,200 and interest. To this application the bank has filed an answer setting up: First, that the indebtedness of the assignor to it should be set off against any interest the assignee has in the said promissory note; and second—that it has a banker's lien on the note for the balance due it from the assignor.

When Meyers applied to the bank for the \$1,200 loan, the bank might have made such terms with him as to the collateral as it saw fit; and might have refused to grant the loan unless the collateral was given upon such terms as to be security for any balance due from him to the bank, and although it had in common use a form of note that would have so constituted the collateral, it did not require it to be used but accepted a promissory note in the ordinary form, and no reference was made to Meyers' other indebtedness to the bank, and in the credit book of the bank the collateral is credited to this particular loan. Nor does it make any difference that afterwards, upon a renewal of the note, it was, without Meyers' knowledge, laid over until after the renewal of the \$1,700 note, when both the notes were entered on the credit book of the bank together, because the bank could not change the original agreement without the consent of Meyers.

It is well settled that where collateral security is left with a bank for a particular purpose, the right of the bank to subject it is limited to the purpose for which it received it, and the right of the bank to a lien for its general balance is excluded. *Reynes v. Dumont*, 130 U. S., 854, 890, *et seq.*, and cases cited by Mr. Chief Justice Fuller in the opinion of the court.

The bank, therefore, having obtained the Boyle note under a special agreement to hold the same as collateral for the \$1,200 note, its right to hold the note is limited by the agreement, and upon payment of that note the collateral should be surrendered. Nor does the fact that Meyers afterwards made an assignment make any difference, for any rule that would enlarge the rights of creditors who hold security at the expense of the general creditors would be unjust.

Nor will the doctrine of set-off apply, for the bank holds the note under a special agreement, which being performed, the title of the bank to the note ceases, and no right or title to the note remains in the bank against which it might set off its claim.

In re Assignment of George Meyers.

An order will therefore be made that the bank deliver up to the assignee the Boyle note, upon payment of the \$1,200 note with interest.

Follett & Kelley for the bank.

Drausin Wulstn, contra.

SETTLEMENT OF ESTATES.

[Hamilton Common Pleas, April, 1900.]

JOSEPH C. WOODRUFF V. ELIZA F. SNOWDEN.

1. ADVANCEMENTS DEFINED.

Advancements are gifts by a parent *in praesenti* of a portion or all of the share of his child in his estate which would fall to it under the statute of distribution or descent, or come to it by will.

2. THE GIFT OR CONVEYANCE MUST BE IRREVOCABLE.

One of the *criteria* of advancements is that the gift or conveyance must be irrevocable, divesting entirely the ancestor's interest, so that the thing in question forms no part of the property to be administered.

3. DEVISEES NOT CHARGED WITH LACHES OF THE EXECUTRIX.

Devises cannot be charged with the laches of the executrix of the estate.

4. NOT THE DUTY OF DEVISER TO REQUIRE INVENTORY.

An heir or devisee of an estate has the right to compel the filing of an inventory of the estate, but it is not his duty to do so.

5. INDEBTEDNESS OF A DEVISER OF SPECIFIC REALTY.

The indebtedness of a devisee of specific realty is not, without judgment and levy by the executor, a charge upon or set-off against the realty so specifically devised.

6. SUCH INDEBTEDNESS TO BE PAID INTO THE ESTATE.

Where one owes money to an estate and is bound to increase a *residuum*, which is a mixed or blended fund, or the general mass of the estate, by the payment of his indebtedness, he cannot claim an aliquot share given to him out of that mass without first making the payment or contribution which completes it. The executor has the right to pay such indebtedness out of the general fund in hand.

JELKE, J.

In the month of February, 1883, Judge Edward Woodruff died testate, his will being in words as follows:

"I, Edward Woodruff, of Hamilton county and state of Ohio, being in good bodily health and of sound and disposing mind and memory, do make and publish this my last will and testament, as follows:

"First. I will and direct that all my just debts be paid, including such as may be due to my wife by promissory notes.

"Second. I give and devise to my beloved wife, Harriette S. Woodruff, for the term of her natural life, all that piece or parcel of real estate on which we now live, situate on Mt. Auburn, in the city of Cincinnati, state of Ohio, commencing at a point in the east line of Auburn street (now Auburn avenue) forty-nine feet six inches south of the land lately owned by William M. Richardson, being the third tenement from the north end, in a block of four brick dwellings erected by Jethro

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Mitchell, with all the improvements, privileges and appurtenances thereto belonging, being the same premises conveyed to me by said Jethro Mitchell and wife, by deed dated September 28, 1872, and recorded in book 405, page 239, of the records of deeds in Hamilton county, Ohio, I also give and bequeath to my said wife, Harriette S. Woodruff, all my household furniture, silverware, piatio, book case and books, to hold the same during her natural life, with the right to sell or dispose of so much thereof as she may see proper. I also give and bequeath to her all the income and profits of all the rest and residue of my estate, real, personal and mixed, to receive and use said income and profits during her natural life, with power to collect debts and to change and reinvest any bonds, stocks and securities as she may consider beneficial to my estate.

"Third. I devise and bequeath said real estate on Mt. Auburn, above described, and all the rest and residue of my estate, real, personal and mixed, with all said household furniture, silverware, piano, book case and books, including the proceeds of my life insurance policy, after the decease of my wife, to my children, to be equally divided between them; the representatives of any of my said children who may be deceased, to take the share of such deceased child, respectively, under this will. This devise and bequest to my children being subject, however, to the devises and bequests to my said wife as above made, which are to be in lieu of her dower in my real estate and in lieu of the statutory allowance for her support or otherwise.

"Fourth. I hereby appoint my said wife, Harriette S. Woodruff, executrix of this my last will and testament, hereby revoking all other wills by me made, and I request that no bond be required of her for the performance of the trusts under the same.

"Witness my hand and seal this thirteenth day of January, eighteen hundred and eighty-one.

"[SEAL]

EDWARD WOODRUFF.

"Signed, sealed, published and declared by the said Edward Woodruff to be his last will and testament in our presence and in the presence of each other on the date thereof.

S. N. MAXWELL,
JOHN S. CONNER.

"Whereas, I, Edward Woodruff, of Hamilton county, state of Ohio, having duly executed my last will and testament in writing, bearing date the thirteenth day of January, eighteen hundred and eighty-one (1881):

"Now, I do hereby declare this present writing to be a codicil to my said will and taken as a part thereof; and I do hereby direct and empower my said wife, Harriette S. Woodruff, as my executrix, to sell and convey my lots of land and real estate at North Bend, in Miami township, county of Hamilton aforesaid; and also my lots of land fronting

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on the west side of Dane street (or avenue) in the subdivision of the real estate of James C. Ludlow, deceased, in said county, made by Charles C. Murdock, master commissioner, either at public or private sale, on such terms as she may deem proper, and she may use the interest and income arising from the proceeds of said sales, for her own use during her natural life, and at her decease the principal and whatever interest may remain shall be divided between my children and their legal representatives, share and share alike, as provided in my said will for the other property.

"In witness whereof, I have hereunto set my hand and seal this twenty-ninth day of January, eighteen hundred and eighty-one.

"[SEAL]

EDWARD WOODRUFF.

"Signed, sealed and published by said Edward Woodruff as and for a codicil to his last will and testament and as a part thereof, in the presence of us who have subscribed our names in his presence and in the presence of each other.

"S. N. MAXWELL,
"JOHN S. CONNER."

After the making of said will and codicil and before the death of said Edward Woodruff, there was executed and delivered to him by his son, Horace, a promissory note, as follows:

"\$5,000.00.

CINCINNATI, June 1st, 1882.

"One year after date I promise to pay to the order of Edward Woodruff five thousand dollars, with interest from date at the rate of eight per cent. per annum, interest payable monthly on the first day of each and every month hereafter until paid. Value received.

"(Signed)

HORACE W. WOODRUFF."

Then, upon the death of said Edward Woodruff, his last will and testament was admitted to probate and record on, to-wit, February 21, 1888, in the probate court of Hamilton county, Ohio, of which county he was a resident at the time of his death, and letters testamentary were thereupon issued by said court to his widow, Harriette S. Woodruff, the executrix therein named, who accepted said appointment. Said Harriette S. Woodruff having departed this life in the year 1897, subsequently, to-wit, upon December 10, 1897, letters of administration upon the estate of said Edward Woodruff, with his will annexed, were issued by said court to the defendant, Harriette W. McAlpin, who accepted said appointment and was duly qualified and is now acting as such administratrix. And upon, to-wit, December 10, 1897, letters of administration upon the estate of said Harriette S. Woodruff, who had died a resident of said county of Hamilton, were issued by said probate court to said Harriette W. McAlpin, who accepted said appointment and was duly qualified, and is now acting as such administratrix.

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Certain endorsements upon the note, a memorandum of payments upon a paper attached thereto, and entries in the account book of the executrix show that Horace W. Woodruff paid interest on said note down to June, 1891.

At the time of the death of said Harriette S. Woodruff there remained of the estate of which Edward Woodruff died seized the real estate in the petition described that was owned by him at the time of his decease, excepting only said tract one hundred feet square sold to the board of education of North Bend; the real estate described in Millcreek township that was held by way of mortgage by said Edward Woodruff at the time of his decease and that was subsequently conveyed to said Harriette S. Woodruff as in the petition set out; the forty shares of capital stock of the First National Bank of Cincinnati as set out in the petition, and the said note of Horace W. Woodruff, dated June 1, 1882, subject to the credits thereon aforesaid.

Of the real and personal estate left by said Edward Woodruff at his decease and remaining at the death of his widow, Harriette S. Woodruff, as aforesaid, the plaintiff and the defendants, Eliza F. Snowden, Louisa W. Kinney, Isabella W. Forbes, Edward Woodruff, Horace W. Woodruff and Harriette W. McAlpin are each entitled to an undivided one-seventh part. Horace W. Woodruff is now insolvent and his share in his father's estate on distribution would not equal the principal and interest due on said note.

What steps were taken by the executrix upon first undertaking the administration of the estate in 1888 and whether an inventory showing this note of Horace W. Woodruff was prepared and filed, it is impossible now to ascertain, as the original administration docket was destroyed in the court house fire. The administration docket prepared from the meager data obtainable after the fire shows no such inventory, and no inventory of said estate appears down to the beginning of this action.

It does not appear that the following persons claiming to have liens on the share of the said Horace W. Woodruff in fact knew of the existence of this liability of his to the estate, and probably none of them did know of it.

The Grand National Building Association Company recovered a judgment in certain foreclosure proceedings against Horace W. Woodruff on November 27, 1894.

Elijah Coombe took a mortgage on Horace W. Woodruff's share in certain real estate on Mt. Auburn belonging to Edward Woodruff's estate on November 10, 1897.

Horace W. Woodruff on November 8, 1897, and December 2, 1897, pledged and assigned his interest in his father's estate to Elijah Coombe to secure certain notes.

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Joseph Cheesman recovered a judgment in a magistrate's court and filed a transcript for lien and execution in this court in cause No. 96678, July 11, 1893.

The Second National Bank of Cincinnati, A. R. Gottschalk, H. T. Loomis, assignee of C. Bentley Matthews and Frank Thornton, in the pleadings set up liens severally asserted against the interest of Horace W. Woodruff in his father's estate.

The brothers and sisters of Horace W. Woodruff claim that in the distribution of their father's estate Horace should receive the five thousand dollar note aforesaid in payment to him of his distributive interest in said estate. The note and interest being fully equal to it if not more than the amount of such share, the result of such distribution would be that the lienholders aforesaid would get nothing.

That said lienholders stand together, and contend that the claim of the estate of Edward Woodruff against Horace W. Woodruff on said note should be reduced to judgment by the executrix, and that such judgment when so obtained can stand on no better footing than their liens, and should be subjected to a determination of priority as between them, and at best should be suffered to do no more than pro rata with them in the share of said Horace computed irrespective of his note to the estate.

It will perhaps clear the way to a solution of the problem of this case to ascertain and remember what this five thousand note is not and thus be assured of what it is.

It is not an advancement. Advancements are described as gifts by a parent *in praesenti* of a portion or all of the share of his child in his estate which would fall to it under the statute of distribution or descent, or come to it by will; and one of the *criteria* of advancements is that the gift or conveyance must be irrevocable, divesting entirely all of the ancestor's interest so that the thing in question forms no part of the property to be administered. Herkimer v. McGregor, 126 Ind., 258; Harley v. Harley, 57 Md., 348; Dugan v. Giddings, 3 Gill, Md., 156; Miller's Appeal, 81 Penn. St., 387; Fellows v. Trusts, 46 N. H., 35; Joyce v. Hamilton, 111 Ind., 163; Black v. Whithall, 9 N. J. Eq., 586; Darne's Exro. Lloyd, 82 Va., 859; Johnson v. Patterson, 18 Lea, 81 Tenn., 632-3; Woerner's Law of Administration, * p. 1214.

This is not the case of a five thousand dollar note made payable one year after date.

For the same reason it is manifestly not a gift absolute.

It then remains that the five thousand dollars was simply a loan and became a debt due the estate, which is evidenced by the two payments of interest during the testator's lifetime and the continued payment of interest for many years to the executrix after his death.

It is also well to remember that the loan was made and the note executed after the testator had made his will.

It is then the relation of a debt due the estate to such estate on distribution under the will we have under consideration.

Section 4169, Rev. Stat., which has been mentioned in argument, can have no application because it expressly provides for "advancements" in cases of intestacy.

The case of *Fels v. Fels*, 1 Circ. Dec., 285, cited by all the counsel for lienholders herein, was decided under the statutory provisions, in secs. 4169-4172, Rev. Stat. In that case the title to specific real estate was cast upon the heirs by the statute of descents, and sec. 4169, Rev. Stat., determined what could be offset against an heir's share on division or distribution, and a debt was not so provided for by that section of the statutes.

We must look to the will to see what is the nature of the estate in which Horace W. Woodruff is to participate on distribution.

If it is specific realty this court is of the opinion that the debt can not be offset; if it is personalty it can.

We have the authority of the Supreme Court of Ohio in case of intestacy on distribution of personalty for treating a debt due the estate in the same manner as an advancement and off-setting it. *Martin v. Martin*, 56 Ohio St., 833-840:

"The indebtedness of a legatee or distributee constitutes assets of the estate, which it is the executor's or administrator's duty to collect for the benefit of creditors, legatees or distributees. Hence such indebtedness may be deducted from any legacy or distributive share of the debtor."

Strong's Executor v. Bass, 85 Pa. St., 833:

"The assignee of an insolvent legatee or distributee is liable in equity to a set-off of his assignor's indebtedness to the estate against the legacy."

Jeff v. Wood, 2 P. Wms., 128 (1728); [Woerner's Law of Administration, * p. 1235-1236; *Bailey's Estate*. *Jackson's Appeal*, 156 Pa. St., 684; *Gosnell v. Flack*, 76 Md., 423; *Dixon v. Storm*, 5 Redfield, 419.

Returning to the will, I find that in item second the testator gives an estate for life in the homestead situate on Mt. Auburn to his wife, Harriette S. Woodruff, and in item third provides:

"I devise and bequeath said real estate on Mt. Auburn above described, and all the rest and residue of my estate, real, personal and mixed, with all said household furniture, silverware, piano, book case and books, including the proceeds of my life insurance policy, after the decease of my wife, to my children to be equally divided between them."

I am of opinion that, as to the Mt. Auburn real estate, there was a devise of specific realty, and that by testator's will the devisees of Edward Woodruff took immediately on his death a vested remainder in that piece of property, subject only to be divested for the payment of decedent's debts.

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As to this specific property, therefore, I am of opinion that Horace's note is not a set-off as against his interest therein, and that the executrix must proceed, like any other of Horace Woodruff's creditors, to subject it to the payment of his debt to the estate, *i. e.*, by judgment and levy.

As to "all the rest and residue of my estate, real, personal and mixed, with," etc., it is a different matter.

In Akerman v. Akerman, 8 L. R., Ch. D., 212, in 1891, it was decided:

"A testator devised and bequeathed all his residuary real and personal estate to trustees upon trust to convert, and out of the moneys to arise from conversion to pay his debts and funeral and testamentary expenses and legacies, and divide the net residue into seven parts, three of which were given to three of his sons absolutely. The testator in his lifetime had advanced sums of money to each of the three sons, but any right of action in respect of such sums, assuming them to be debts owing to the testator, was at the time of his death barred by the statute of limitations.

"Held, that the principle to be deduced from Cherry v. Boultbee and Courtney v. Williams is that a person who owes an estate money—that is to say, who is bound to increase the general mass of the estate by a contribution of his own, can not claim an aliquot share given to him out of that mass without first making the contribution which completes it; and that by the application of this principle to the present case, the three sons were bound to bring into account as against their respective shares, as well of the proceeds of sale of the residuary real estate as of the residuary personal estate, any sums due by them to the testator at the date of his death, with interest at four per cent. from that date.

"By the will freehold and leasehold hereditaments were given specifically to the three sons.

"Held, that they were respectively entitled to the properties specifically given without first making good what (if anything) they owed to the testator's estate.

And on pages 220-221, Lord Kekewich, who decided that case, said:

"Then I am asked to hold that here these three sons do not owe money to the estate. In each case there is an I. O. U. or what is equivalent to an I. O. U., a certificate of indebtedness, and in each case the debt was statute barred at the date of the testator's death. That will not prevent the operation of this rule which is applicable to personal estate, and which I hold to be equally applicable to this mixed fund."

Reference is made in this case to the decision of Cherry v. Boultbee, in 4 Myl. & Cr., 446, and this case is said to be decided on the same principle, though Cherry v. Boultbee was decided the other way because the legatee had in the lifetime of the testatrix gone into bankruptcy and the testatrix had not proven her claim to the assignee.

I think the case of Akerman v. Akerman is likewise authority for what I have decided as to the Mt. Auburn property.

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See also Courtenay v. Williams, 3 Hare, 539 (1844), and same case on appeal, 15 L. J. N. S. Ch., 204; Oxsheer v. Nave, 90 Texas, 568.

The case In re Dickinson's Estate, 148 Pa. St., 142, supports my view on this branch of the case at bar, but seems contrary to my opinion as to the Mt. Auburn property. See also Chase v. Davis, 65 Main, 107.

A number of Kentucky cases have been cited by counsel on both sides of this controversy, viz., Scobee v. Bridges, 87 Ky., 427; Thompson v. Myers, 95 Ky., 597; Taylor v. Jones, 97 Ky., 201; but I do not get much satisfaction out of them because they are not entirely consistent, and as Woerner notices, * p. 1216, citing 13 Bush., 76 Ky., 1, the General and Revised Statutes disregard the intention of the testator or intestate, requiring an equal distribution of the estate. This establishes a policy which makes the Kentucky cases on this point of little weight as general authority.

Irvine v. Palmer, 97 Tenn., 463, reviews the Tennessee cases and cites and distinguishes Steele v. Frierson, 85 Tenn., 436. I think Irvine v. Palmer sustains the views I take on both branches of this case.

The five thousand dollar note is as much a part of the residue of Edward Woodruff's estate as the North Bend real estate, the Millcreek township real estate, the real estate acquired from Thornley or the forty shares of First National Bank stock, and taken altogether they constitute a blended fund, or in the word of Akerman v. Akerman a "mass" to which Horace is indebted, and in which he has a right to participate, and hence there is the right of set-off, or to use the expression preferred by Lord Cottenham in Cherry v. Boultbee, "a right to pay out of the fund in hand."

The Ohio cases cited are: Needles v. Needles, 7 Ohio St., 432; Parsons v. Parsons, 5½ Ohio St., 470; Martin v. Martin, 56 Ohio St., 333, and Fels v. Fels, *supra*, in none of which is the precise point herein involved passed upon.

The only point remaining to be considered is that of laches urged against the executrix. I do not give this much weight because,

1. If the executrix were guilty of laches it could not be charged against the devisees.
2. The heir or devisee has the right to compel the filing of an inventory, it is not his duty to compel it.
3. The question of Horace's rights in his father's estate would not come up until after his mother died.
4. The laches would be just the same on the part of those giving credit to Horace and claiming under him. They had no right to presume that everything was all right because there was no inventory. The very absence of that, which ought to have been, should have

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prompted further inquiry, which would have disclosed the five thousand dollar note.

As to the Mt. Auburn real estate, the liens are good; as to the residue, the note will set off Horace's interest.

Pogue & Pogue, Wm. Hartley Pugh, Richard E. Werner, James B. Matson, H. T. Loomis and John Wentzel, for lienholders.

Wm. Worthington, for executrix and children of Edward Woodruff.

STATUTES—ATTACHMENT.

[Superior Court of Cincinnati, Special Term, April, 1900.]

AUGUST S. GORHAM v. CHARLES J. STEINAU.

1. RULE AS TO CONSTRUING STATUTES.

That which is plainly implied in the language of a statute is as much a part of it as that which is expressed.

2. NOT THE PROVINCE OF COURTS TO RELIEVE AGAINST OMISSIONS.

It is not the province of courts to relieve against the mistakes or omissions of the legislature, however unwise or unjust may be the consequence. Therefore, if a reasonable intention can not be fairly inferred from any language used in the statute, the courts must construe accordingly.

3. STATUTES RELATING TO NON-RESIDENCE—ATTACHMENT.

If the intention of the legislature to constitute non-residence a ground of attachment can be fairly inferred from any language contained in any section relative to the subject of attachments, courts should construe accordingly. Therefore, the last clause of sec. 5521, Rev. Stat., read in connection with sec. 5523, and subdivision 3 of sec. 5048, Rev. Stat., contains provisions relative to attachment against non-residents, from which an intention to constitute non-residence a ground for attachment may and must reasonably be inferred.

HEARD ON MOTION to discharge attachment.

JACKSON, J.

The motion of defendant herein is predicated upon the claim that sec. 5521, Rev. Stat., as amended, 98 O. L., 318, does not make non-residence of an individual a ground for attachment in this state. In subdivision 1 of this section as amended, non-residence does not appear as a specific ground for an attachment. Nevertheless the intention of the legislature must be sought for in other parts of this and also in other sections. If the intention of the legislature to constitute non-residence a ground for attachment can be fairly inferred from any language contained in any section relative to the subject of attachment, courts should construe accordingly; because it would be manifestly unwise and unjust to eliminate non-residence as a ground for attachment. Such intention on the part of the legislature must not be presumed. Still if such an intention can not be fairly inferred from any language used, the courts must construe accordingly, since it is not the province of courts to relieve against the mistakes or omissions of the legislature, however unwise or unjust may be the consequences. But to my mind the last

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clause of sec. 5521, Rev. Stat., read in connection with sec. 5523, Rev. Stat., and subdivision 3 of sec. 5048, Rev. Stat., contain provisions relative to attachment against non-residents, from which an intention to constitute non-residence a ground for attachment must reasonably be inferred.

I can not agree with the argument of learned counsel for the defendant that in order to constitute non-residence a ground for attachment it must specifically so appear.

"That which is plainly implied in the language of the statute is as much a part of it as that which is expressed." *Doyle v. Doyle*, 50 Ohio St., 830.

To my mind the several references to non-residence in connection with this subject of attachment, in different sections of the statutes, do implied constitute non-residence a ground for attachment.

This view is sustained in a well considered case by the circuit court in *Auerbach v. Swadner*, 10 Circ. Dec., 435, which case I am constrained to follow, both on authority and on the reason there adopted.

The motion to discharge the attachment must be overruled.

Dan Thew Wright, for motion.

Harmon, Colston, Goldsmith & Hoadly, contra.

COURTS—JURISDICTION.

[Hamilton Common Pleas, March, 1900.]

RAPHAEL STRAUSS v. MRS. RUDOLPH JACOBS.

1. A NISI PRIUS JUDGE WILL NOT DISREGARD SUPREME COURT OBITER DICTA.

A *nisi prius* judge will not disregard the holding of the Supreme Court that "a judgment of dismissal without prejudice is not a judgment from which an appeal may be taken under section 3 of the justice act," notwithstanding the claim that so far as the subject of appeals is concerned that declaration is an *obiter*.

2. JURISDICTION OF SUBJECT MATTER.

Jurisdiction of the subject matter of an action is not conferred by the filing of an answer by the defendant, and his appearance for trial.

MURPHY, J.

This is a motion to dismiss an appeal from the docket of a justice of the peace. The facts are that the plaintiff brought his action before the justice of the peace for the sum of \$50; the justice of the peace heard the testimony and dismissed the cause without prejudice; the plaintiff appealed the action into this court; in due time the plaintiff filed his petition, and the defendant filed a motion to make it more definite and certain, which motion was overruled; thereupon the defendant filed her answer; the case was set for trial, and being reached the plaintiff's counsel asked for and obtained a postponement of the trial because the

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plaintiff was sick : defendant thereupon filed this motion to dismiss this appeal for the reason an appeal does not lie, under sec. 6588, Rev. Stat., from an order of a justice of the peace dismissing a cause without prejudice.

Section 6588, Rev. Stat., is as follows :

" In all cases not otherwise specially provided by law, either party may appeal from the final judgment of any justice of the peace to the court of common pleas of the county where the judgment was rendered."

This section of the Revised Statutes is the same, word for word, as sec. 3, S. & C., 788.

The defendant, to support his motion, relies upon the case of Ferral v. Bluffton Lodge, 81 Ohio St., 463. In that case the magistrate heard the testimony, and on motion of the defendant below dismissed the cause without prejudice, just as was done in this case. The plaintiff below did not appeal, but took the case to the court of common pleas on error by bill of exceptions. The judgment of the magistrate was affirmed by the court of common pleas and the district court, but the Supreme Court reversed all the courts below and remanded the case. It will be seen by an examination of the case just cited that the right to appeal was not necessarily involved in the facts of the case ; but the court, nevertheless, did consider the question, not only in the opinion of the court—which might be treated as *obiter* had it stopped there—but declared the law, in the second of the syllabi, in the following language :

" 2. A judgment of dismissal without prejudice is not a final judgment from which an appeal may be taken under section 3 of the justice's act. (S. & C., 788.)"

The plaintiff in opposing the motion contends that so far as the subject of appeals is concerned the opinion of the Supreme Court just cited is *obiter* and therefore not binding ; but it would be a strong thing for a *nisi prius* judge, when the Supreme Court has declared the law upon the subject, to disregard the law so declared, and I shall not do it in this case.

But the plaintiff contends that the defendant by filing her motion to make the petition definite and certain ; by filing her answer ; and by appearing for trial, conferred jurisdiction on this court, or is estopped from denying such jurisdiction. The plaintiff relies on C. C. C. Ry. Co. v. Mara, 26 Ohio St., 185, and King v. Penn, 48 Ohio St., 57.

For the purpose of this motion it may be said that jurisdiction is of two kinds—that which the legislature alone can confer, and that which the parties may waive, or from which their actions would be estopped from denying. In the cases cited by the plaintiff or relied upon by him the latter kind of jurisdiction is the one involved, for the court, if it had acquired jurisdiction over the parties to the action, had jurisdiction of the subject matter. The legislature having fixed the exclusive jurisdic-

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tion of a justice of the peace in sums less than one hundred dollars, it follows that the court of common pleas had no jurisdiction of the subject matter in this case. The legislature alone could confer jurisdiction, and not having done so, no consent, and no action of the defendant or of the parties to the action, could confer jurisdiction in the absence of legislative action.

This was determined in a case tried by the judges of the second circuit court sitting in this county. In that case the plaintiff in error had not complied with the terms of the statute relating to the filing of the bill of exceptions. The case was argued by both parties and submitted to the court without discovering the defect. The court, after considering the case, dismissed the petition in error because of this defect. The defendant in error waived the defect and consented that the judges might consider the case and determine it upon its merits, and both parties requested them to do so, yet the judges declined because it was a jurisdictional fact which the legislature alone could confer and could not be conferred by consent of parties.

To the same effect is *Long v. Newhouse*, 57 Ohio St., 348. In that case the Supreme Court discuss the subject, beginning at the bottom of page 365 and ending near the bottom of page 366. The court say: "The trial judge had lost his jurisdiction over the subject matter, and he could not be again clothed with this by the consent of parties." If jurisdiction could not be conferred by the consent of a party, jurisdiction could not exist by estoppel, for, to say the least, consent is as strong as estoppel.

It follows, therefore, that the motion will be granted and the appeal dismissed.

Adolph Brown, for the motion.

C. W. Baker, for the plaintiff.

TELEPHONE COMPANIES—STREETS.

[Muskingum Common Pleas, 1900.]

**ZANESVILLE TELEPHONE AND TELEGRAPH CO. v. ZANESVILLE.*

1. PROBATE COURTS—ATTEMPT TO CONFER LEGISLATIVE DUTIES UPON.

Section 3461, Rev. Stat., relating to telegraph companies, and by sec. 3471, Rev. Stat., extended to apply to telephone companies, authorizing the probate court, upon failure of the municipal corporation and the company to agree, "to direct the mode in which such lines shall be constructed along the streets, alleys or public ways, so as not to incommod the public," attempts to confer legislative functions upon probate courts and is, therefore, unconstitutional and invalid.

* The judgment in this case was reversed by the circuit court; see 10 Circ. Dec., 783. The circuit decision was reversed by the Supreme Court and judgments of the probate and common pleas affirmed, 63 Ohio St.

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2. USE OF STREETS—LEGISLATIVE FUNCTION.

Determining and fixing of the mode of use of streets and alleys of a municipality by a telephone company, so as not to incommod the public in the use of the same, is a legislative function or duty.

3 LEGISLATIVE POWER CANNOT BE CONFERRED UPON COURTS.

While the legislature has the power, under sec. 8, art. 4, of the constitution, to establish a court, it has no power to confer upon such court other than judicial functions.

FRAZIER, J.

The record in this case discloses that, prior to August 9, 1899, the Zanesville Telephone and Telegraph Company filed its petition, amendment to the petition, and supplemental petition in the probate court of this county, wherein it is alleged said company is a corporation duly organized under the laws of Ohio, for the purpose of constructing, operating, and maintaining a line or lines of telephone or telegraph within the state of Ohio, by the use of the streets, alleys, public ways, and other public grounds of the villages, towns and cities of said state, and any of the public roads, highways and lanes within the state, by entering thereon and making the preliminary surveys and using and occupying said streets, alleys, and highways with poles and other appliances necessary in constructing, operating, and maintaining a line of telephone and telegraph; and the said company has the right to contract with any other person, individual, or company, for the purpose of transmitting messages over their telegraph or telephone lines, and with a right to purchase any lines of telephone or telegraph from other individuals or corporations.

The petition further represents that, on March 20, 1899, the said company presented to the city council of Zanesville, a certain ordinance and agreement, providing for the mode of use within the limits of said city over the streets, alleys, and public ways of the same, the agreement providing for the mode and manner in which said telephone and telegraph lines should be constructed along said streets, alleys, and public ways, so as not to incommod the public by the use of the same; that said ordinance and agreement was by said city council referred to the street and alley committee. Said plaintiff frequently requested said street and alley committee to act upon the same and make report to the city council, but it refused so to do. The petition further alleges that, plaintiff was unable to agree with the municipal authorities as to the mode of use of the streets and alleys, and that the municipal authorities unreasonably delayed to enter into any agreement with the petitioner.

In the supplemental petition, it is also alleged that, the city had proposed an agreement to the plaintiff, but that the agreement was of such a character that the plaintiff could not accept the same, and did decline to accept the same, and that the plaintiff and said city were unable to come to terms as to the manner and mode in which plaintiff

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might use and occupy the streets of the city of Zanesville, so as not to incommodate the public in the use of the same.

The prayer of the petition and the supplemental petition is that the probate court might determine and fix the mode of use of the alleys, streets, and public ways of the said city for the said telephone and telegraph company.

Various motions were made by the defendant city to these pleadings of the plaintiff below, and a demurser was interposed to the petition, amendment, and supplement thereto, which demurser was overruled by the probate court; and thereupon, the defendant city filed its answer to the petition, amendment and supplement thereto, in which it is alleged that the city did not refuse or unreasonably delay entering into an agreement with the said company, and in which it denied that the mode of use proposed by the city council was unreasonable, and denied that the city and the company were unable to agree as to the mode of use of said streets and alleys, and said city council only took sufficient and reasonable time to duly consider and act upon the matter in the interest of the said city.

The record further discloses that, on August 9, 1899, the cause came on for hearing in the probate court, upon the pleadings and the evidence. Whereupon, the following judgment was rendered by the probate court:

"This day this cause came on for trial, and the court having heard the evidence and arguments of counsel, and being fully advised in the premises, finds that the law, to-wit:

Section 3461, Rev. Stat., of Ohio, in so far as it authorizes this court to act, is unconstitutional, and that this court has no jurisdiction to hear and determine this cause, and for that reason, does not here consider the evidence introduced upon the trial of this cause, in any respect, and for the reason stated, it is ordered that the petition of the Zanesville Telephone and Telegraph Company filed herein be and it is hereby dismissed, and said company shall pay all the costs of this proceeding, to all of which said company then and there excepted."

The record further shows that, a motion for a new trial was submitted, which was overruled by the probate court, and that the plaintiff duly excepted. A bill of exceptions was duly allowed.

The errors complained of in the petition in error are:

1. That the court erred in striking certain allegations out of the petition.

2. Said court erred in overruling the motion for a new trial.

3. Said court erred in dismissing the petition of the plaintiff in error below and in holding that it had no jurisdiction to hear and determine the cause of action set forth in plaintiff's petition and in holding sec. 3461, Rev. Stat., unconstitutional.

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4. That the court erred in the admission and rejection of certain testimony.

5. That the court erred in giving judgment for the city of Zanesville.

6. For other errors apparent upon the record.

The only matter urged upon the hearing of the petition in error was that, the court below erred in holding that it had no jurisdiction to hear and determine the cause, in dismissing the proceedings, and in holding sec. 3461, Rev. Stat., unconstitutional.

Section 3461, Rev. Stat., provides as follows :

"When any lands authorized to be appropriated to the use of a company are subject to the easement of a street, alley, public way, or other public use, within the limits of any city or village, the mode of use shall be such as shall be agreed upon between the municipal authorities of the city or village and the company ; and if they cannot agree, or the municipal authorities unreasonably delay to enter into an agreement, the probate court of the county, in a proceeding instituted for that purpose, shall direct in what mode such telegraph line shall be constructed along such street, alley, or public way, so as not to incommod the public in the use of the same ; but nothing in this section shall be so construed as to authorize any municipal corporation to demand or receive any compensation for the use of a street, alley, or public way, beyond what may be necessary to restore the pavement to its former state of usefulness."

Section 3471, Rev. Stat., provides that the provisions of sec. 3461, Rev. Stat., shall be extended to any company organized to construct a line or lines of telephone.

Counsel for plaintiff in error contend that, inasmuch as the constitution does not expressly prohibit the general assembly from legislating upon the subject matter provided for in sec. 3461 and 3471, Rev. Stat., and inasmuch as sec. 8, art. 4 of the constitution provides that the probate court may have such jurisdiction as may be provided by law, therefore, sec. 3461, Rev. Stat., is not unconstitutional, and that the probate court is fully authorized and empowered, under said section, to determine and fix the mode of use in which the streets and alleys of the municipality may be occupied by a telephone company, so as not to incommod the public in the use of the same.

Counsel for defendant in error, on the other hand, claim that sec. 3461, Rev. Stat., is unconstitutional, because by it, the legislature has attempted to confer upon the probate court, a judicial tribunal, a power not judicial in its nature and that the determining and fixing of the mode of use of the streets and alleys of a municipality by a telephone company, so as not to incommod the public in the use of the same, is a legislative function or duty ; that the probate court cannot be called on to exercise any legislative duty or function ; that it is no part of the constitutional duties of the probate court to provide police regulations for the municipality ;

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and that the probate court had a right to decline to assume the responsibility incident to the discharge of those duties.

Thrown into syllogistic form, the argument of counsel for defendant in error is that, the legislature cannot, under the constitution, impose upon the probate court the exercise of non-judicial functions; that the duty or function imposed on the probate court by sec. 3461, Rev. Stat., is non-judicial; therefore, sec. 3461, Rev. Stat., is unconstitutional, and that the court may refuse to exercise or perform the duty so enjoined by said section.

Whether or not the premises in the syllogism are true or false cannot be determined by any *a priori* reasoning. Their truth or falsity can be determined only by the inductive and critical process, and the interpretation of the constitution itself, and a determination of the exact nature of the power or duty enjoined upon the probate court by sec. 3461.

Section 2, art. 1, of the constitution provides that: "The legislative power of this state shall be vested in a general assembly, which shall consist of a senate and house of representatives."

Art. 3, section 1, of the constitution provides that: "The executive department shall consist of a governor, lieutenant governor, secretary of state, auditor of state, treasurer of state, and an attorney-general."

Section 1, art. 4, of the constitution provides that: "The judicial power of the state is vested in a Supreme Court, circuit courts, courts of common pleas, courts of probate, justices of the peace, and such other courts inferior to the Supreme Court as the general assembly may from time to time establish."

That, in a broad sense, the powers of one of these departments shall not be conferred upon either of the others is not only within the spirit, but substantially within the letter of the constitution. The universal doctrine of American liberty, under written constitutions, requires the distribution of the powers of government into three departments, legislative, judicial and executive, and that each of these departments, within its own proper sphere, shall be supreme, co-ordinate with, and at the same time independent of the others.

"Constitutional government in the United States is distinguished by the care that has been exercised in committing the legislative, executive, and judicial functions to separate departments, and in forbidding any encroachment by one department upon another in the exercise of the authority so delegated."

"The underlying theory upon which this tripartite division rests is very ancient; but it was in the original constitution of the new American States that it was first practically applied."

"In Virginia, where, under the colonial system, judges sat in the legislature, the bill of rights, adopted in 1776, which marked the transi-

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tion from province to commonwealth, provided that the legislative and executive powers of the state should be separate from the judiciary."

"The distributive clause thus originated was inserted in the other constitution, from time to time adopted by the new states. So that, except in a few instances all the American state constitutions contain a provision for the separation of governmental powers into legislative, executive and judicial."

See Vol. 6, Am. & Eng. Ency., (2d Ed.) 1006.

This doctrine, however, is not without criticism, and the theory is never entirely true in practice.

Goodnow, in his Comparative Administrative Law, p. 20, says: "Modern political science has, however, generally discarded this theory both because it is incapable of accurate statement and because it seems to be impossible to apply it with beneficial results to the formation of any concrete political organization."

Goldwin Smith, in The Bystander, Toronto, May, 1880, says:

"The separation of executive power from the legislative is a dream, though Montesquieu has established the belief that it is one of the great securities of liberty."

See also Wilson's Congressional Government, pp. 285, 806; Steven's Sources of the Constitution of the United States, p. 47; VonHolst, Constitutional Law of the United States, pp. 67, 68.

But the courts and law book writers have not seen fit to follow the vagaries of modern political publicists. From Western Union Telegraph Co. v. Myatt, 98 Fed. Rep., recently decided, (in the circuit court of the United States for Kansas,) I quote the following:

"There is full accord among elementary writers and publicists, who treat of the growth and development of the principles of an enlightened government and the relations between the state and the individual. Dr. Paley says, 'The first maxim of a free state is that the laws be made by one set of men and administered by another; in other words, that the legislative and judicial characters be kept separate.' Blackstone says, 'In this distinct and separate existence of the judicial power in a peculiar body of men, nominated indeed, but not removable at pleasure by the crown, consists one main preservative of the public liberty, which cannot subsist long in any state, unless the administration of common justice be in some degree separated, both from the legislative and also from the executive power.'

Then in the same case, there are long quotations from Baron Montesquieu, and also from Kilbourne v. Thompson, cited in 103 U. S., 191. The courts have recognized that the separation of the powers is far from complete, and that the line of demarkation between them is often indefinite.

"Each of the three departments normally exercises powers which are not within its own province.

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"Thus the executive, by means of the veto, shares the legislative power, and, in passing on claims, the judicial power.

"The legislature may be authorized to exercise the appointing power and in adjudicating claims, and as in some states, in granting divorces, it acts judicially.

"The courts, too, legislate not alone by decisions but also by making rules very often of the force and effect of statutes, and they are not infrequently clothed with the power of appointment.

"Since, however, all the departments of government derive their authority from the same source, they in equal degree, represent the sovereignty, and each within its own sphere is supreme and independent, though in practice they often conflict with each other."

See 6 Am. & Eng. Ency., p. 1009, where the following doctrine is laid down :

"A grant of general powers to one department constitutes of itself an implied exclusion of all other departments from the exercise of such powers, unless the power be conferred on such other departments in express terms."

It is true that there is no positive and specific prohibition in the constitution of Ohio against conferring on any one branch of the government the duties of another co-ordinate branch. The distribution of the powers of government between three departments in the federal constitution is as general in its provisions as the constitution of Ohio.

See Justice Miller's opinion in Kilbourne v. Thompson, 108 U. S., 191; Fed. Rep., Vol. 98, p. 349; Amer. & Eng. Ency., Vol. 6, p. 1009, note 2 and authorities there cited; Cooley on Constitutional Limitations, 250; 98 Fed. Rep., p. 386, par. 5, and Syl; Appeal of Norwalk St. Ry., Co., 37 Atl. Rep., 1085.

This doctrine is also well established in Ohio in State v. Baughman, 38 Ohio St., 459: "The division of the powers of the state into legislative, executive, and judicial, and the confiding of these powers to distinct departments is fundamental. It is essential to the harmonious working of this system that neither of these departments should encroach on the powers of the other."

In State ex rel. v. Peters, 43 Ohio St., 647: "The sovereign power of the state is vested in three departments, legislative, executive, and judicial. Whatever power is vested in either the executive or judicial departments cannot be exercised by the legislative. What are legislative powers, or what executive or judicial powers, is not defined or expressed in the constitution except in general terms. The boundary line between them is undefined and often difficult to determine. Many decisions are reported growing out of this general division of powers, and eminent writers upon constitutional law have endeavored to mark the line. To these sources we must refer without quoting."

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The right of the governor to remove members of the board of police commissioners was sustained on the grounds that in removing them, he was exercising an administrative power, not a judicial one. *State ex rel. v. Hawkins*, 44 Ohio St., 98.

The power of a notary to imprison witnesses is sustained on the ground that it is not the exercise of a judicial power. *DeCamp v. Archibald*, 50 Ohio St., 618.

The power of a county recorder to enter on his record that a lien is void by reason of lapse of time was declared unconstitutional, because it conferred on the recorder judicial power. *State ex rel. v. Guilbert*, 56 Ohio St., 575, 628.

Two cases in Ohio apparently seem to conflict with the above view. The first is *State v. Cincinnati*, 52 Ohio St., 419.

In that case, quoting from the opinion of Judge Williams: "There appears to be no constitutional obstacle in the way of investing a court or judge with such powers. Nor is there any valid objection to their due execution, if the court or judge chooses to perform them."

On page 452, Judge Williams says: "The legislature has, no doubt, empowered the courts and judges to perform these acts and others of like nature, because in that way the best public agencies necessary in carrying the legislation into effect, are most likely to be obtained; and we are not convinced, either that the legislative judgment in that regard is at fault, or that the legislative purpose must fail, at least, so long as the courts and judges charged with the performance of the act interpose an objection."

It may be inferred from that, that if the judges and courts do interpose objections, the consequences might be otherwise.

The other case apparently in conflict with the foregoing view is, *State v. Kendle*, 52 Ohio St., 846.

In that case, it was held that a statute conferring power on the common pleas judges to appoint jury commissioners was constitutional; but in that case, it was held that jury commissioners were mere officers of the court, such as commissioners in chancery, and as are also in a general sense attorneys, and that the court of common pleas, in making the appointment, was really exercising a judicial act.

"Whether the exercise by the judiciary of the appointing power is an infringement on the constitutional separation of governmental functions is a question upon which the authorities are somewhat divided. A majority of the courts which have passed upon it, however, have held to the negative of the proposition and have sustained the exercise of such power." See 6 Am. & Eng. Ency., 1060.

While the courts have not, in the main, hesitated to declare unconstitutional all laws that attempt to impose judicial powers upon the executive or legislative branches of the government, and while, on the contrary, they have, with equal consistency, held in the main all laws

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unconstitutional that have attempted to impose legislative or executive powers upon the judiciary, when they have ascertained that a particular power sought to be conferred is clearly within the sphere of the powers of a co-ordinate branch of the government, still the courts have not always been at one as to whether a particular power belongs exclusively to one department of the government or to another. The difficulty exists in the very nature of things. Many of the powers of government seem incapable of exact definition, and courts have hesitated to say to what particular branch of the government a particular power might belong.

In State ex rel. v. Hawkins, 44 Ohio St., 112:

"Whether power, in a given instance, ought to be assigned to the judicial department is ordinarily determinable from the nature of the subject to which the power relates. In many instances, however, it may be appropriately assigned to either of the departments."

See also 6 Am. & Eng. Ency., 1032.

But the question for consideration here is, whether the power or function sought to be conferred upon the probate court, to fix and determine the mode of use of the telephone company of the streets of the municipality so as not to incommod the public in the use of the same, is judicial in its nature or whether it is legislative merely.

Judge Cooley, in his work on constitutional limitations, page 111, drawing the distinction between judicial and legislative powers, says:

"In fine the law is *applied* by the one and *made* by the other. To do the first, therefore—to compare the claims of parties with the law of the land before established—is in its nature a judicial act. But to do the last—to pass new rules for the regulation of new controversies—is in its nature a legislative act."

And upon page 112, the same author says:

"It is the province of judicial power also to decide private disputes between or concerning persons; but of legislative power to regulate public concerns, and make laws for the benefit and welfare of the state."

See 6 Am & Eng. Ency., 1032, 1033, for further definitions of judicial and legislative power.

Clearly, it seems that the fixing and determining of the mode and manner in which the streets of a municipality shall be used and occupied is the prescribing of a rule, not a decision regarding a rule already established, not a determination of what the law is, but prescribing a law for the use of the streets; and hence, such action on the part of a court is legislative in its nature and not judicial. We are not without authority and adjudication on this point. Judge Cooley, in the same work above quoted, page 252, says:

"The corporation has the exclusive right to control and regulate the use of the streets of the city. In this respect, it is endowed with legislative sovereignty. The exercise of that sovereignty has no limit, so long as it is within the objects and trusts for which the power is con-

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ferred. An ordinance regulating a street is a legislative act, entirely beyond the control of the judicial power of the state."

And in 24 Am. & Eng. Ency. (1st ed.), 42, found in the foot notes: "The power of the common council of a city to authorize the obstruction of streets and alleys is legislative in its character, and can only be exercised by an ordinance passed under the formalities required by law." That is quoted from 27 Ind., p. 394.

See also Dillon on Municipal Cor., secs. 656, 698; Tiedman Mun. Cor., secs. 289, 297; Police Regulations, Keney, 38; 12 Atlantic Rep., 144; 147 Am. St. Rep., 8.

In Keasby on Electric Wires, page 38, I find the following:

"Under the ordinary power to regulate streets, and in the absence of extraordinary immunities conferred on the company by its charter, city governments have the right to supervise and control the erection of telegraph lines and all lines of electric posts and wires in the streets. They may prescribe the size and shape and materials of the poles; they may designate the streets along which the lines shall go, and require a statement or map, showing the location of the several poles, to be submitted to the proper officers. In short, they may regulate the manner of the use of the streets, and take care that the power granted by the legislature to use the streets for these purposes is so used as not to interfere with the other lawful uses of the streets and not to cause danger or inconvenience to the public."

And in 12 Atl. Rep., 144, (Penn. case) it is held that the erection of telegraph poles is a matter of police regulation to be supervised or controlled by ordinance, as may seem proper. Erection of poles upon and stretching of wires along its streets is the right of the city, *i. e.*, the city of Philadelphia. I find in the brief of counsel in that case, several cases are cited, showing that the exercise of such power is simply a police power.

On the exercise of a branch of the sovereignty delegated to the city by the state, and to the same effect, see also—8 Am. St. Rep., 545.

The case of the Norwalk Street Railway Co., 87 Atl. Rep., 1080, decided by the Supreme Court of Connecticut, 1897, is strikingly similar to the one at bar. The law of that state provides that, when the warden and burgesses of any borough, or the mayor and common council of any city, or the selectmen of any town should make any decision, denial, or order respecting the use and occupancy of any of the streets of any borough or city by any street railway company, the said company might take an appeal from such order or decision to the Supreme Court or any judge thereof; that the appeal should be tried by the court; that the judge of the court should make such order or decision regarding the use of the streets as to the court might seem just and equitable.

Under that statute, appeal was taken by the Norwalk Street Railway Company from the decision of the common council, denying the

right of the use of the streets by the railway company, to the Supreme Court, and the Supreme Court, in passing upon that case, in the syllabus, said :

"Under constitution 1818, art. 2, sec. 1, providing that the powers of government shall be divided into three distinct departments, the general assembly has no judicial power, and cannot confer such power on a court or on a judge thereof. Nor can a court or judge thereof exercise a power not judicial."

Quoting from page 1085 : "These mandates are the voice of the sovereign, speaking with a present authority, from which there is no escape. The incapacity of the legislature to execute a power which is essentially and merely a judicial power, and of the judiciary to execute a power which is essentially and merely a legislative power, as well as the limitation of the meaning of legislative power, by force of certain primary principles of government plainly embodied in the constitution, and by the necessities involved in the separation and independence of distinct departments of government, is fundamental to the very existence of constitutional government."

Further down on the same page : "The Supreme Court of the United States has uniformly held that a law conferring on the courts a power which is not a judicial power, within the meaning of the constitution, is unconstitutional. Such a power cannot be lawfully exercised by the court."

On page 1087, quoting from the opinion, the following : "There can be no doubt that making such regulations, *i. e.*, regulations for the use of the streets by street railways, is essentially and distinctively a legislative function. It is also certain that judicial power does not include the exercise of such a legislative function, and that the duty of making such regulations cannot be imposed upon the superior court, because it involves the exercise of legislative power by the court, and because a power in the legislature to impose such duties is inconsistent with the existence of an independent and separate judicial department of government."

But it is claimed by counsel for plaintiff in error that sec. 8, art. 4, of the constitution authorized the grant of jurisdictional power to the probate court, and hence, the legislature is authorized by the constitution to confer upon the probate court the function or duty provided in sec. 8461, Rev. Stat. But the constitution must be interpreted like every other written instrument. All of its provisions must be considered together, and sec. 8 must be construed with sec. 1 of the same article, which provides that, judicial power is vested in the Supreme Court, circuit courts, common pleas, probate courts, and other courts, as the legislature may from time to time establish. While the legislature may establish a court, clearly a court cannot, under this provision, have

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other than judicial jurisdiction, and no other can be conferred by the legislature.

In the case which I have cited at the outset of the opinion, Western Union Telegraph Co. v. Myatt, 98 Fed. Rep., a question was raised regarding the constitutionality of a law passed by the legislature, creating in Kansas, a court of visitation, authorizing that court to regulate freight charges and tolls of telegraph and telephone lines.

The constitution of Kansas is almost identical with ours. Section 1, art. 1, of the Kansas constitution provides :

"The executive department shall consist of a governor, lieutenant governor, secretary of state, auditor of state, attorney general, and superintendent of public instruction."

Section 1, art. 2 : "The legislative power of this state shall be vested in a house of representatives and senate."

Section 1, art. 3 : "The judicial power of this state shall be vested in the Supreme Court, district courts, probate courts, justices of the peace, and such other courts inferior to the Supreme Court, as may be provided by law."

Almost identical with our own in these respects.

Now, in this case, it was held by the circuit court of the United States, as follows :

"The provisions of the constitution of Kansas, designating the separate departments in whom shall be vested, respectively, the executive, legislative and judicial powers of the state, as construed by the Supreme Court of this state, in harmony with the uniform construction given the similar provisions of the federal constitution, contemplate that each department shall be separate and independent of the others, and forbid the uniting of such powers in the same officer or tribunal in respect of the same subject matter."

And paragraph 3 of the syllabus of that case is :

"The court of visitation of Kansas, created by act of January 3, 1899, and given by that act and by chapter 36 of the laws of the same session, general power to regulate the business of railroad and telegraph lines within the state, among others the power to classify freight, require the construction and maintenance of depots, regulate crossings and intersections of railroads, and the operation of trains, require the use of improved appliances, to prescribe schedules of rates, is, in the exercise of such powers, a legislative and administrative body."

Now, if the legislature can, in a single instance, impose any part of its own legislative jurisdiction or functions upon a court, then by a parity of reasoning, the legislature can divest itself of all its power, and confer it upon the courts. It is not doubted that the legislature can delegate its own or a portion of its own power over the streets to a minor legislative body, to the council of a city, or possibly may delegate portions of its powers to boards, but the spirit of the constitution, if not the

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exact letter of the constitution, forbids the delegation of any of its powers to the courts, and the courts may not both legislate and decide.

Upon reason and authority, therefore, it seems clearly established that sec. 3461, Rev. Stat., seeks to confer legislative authority upon the probate court. While perhaps third parties could not complain, if the probate court saw fit to undertake the exercise of that power, yet the court may well say that it would decline to exercise it; because it imposes on it a duty that the legislature had no constitutional right to impose. Therefore, in dismissing the petition and in holding sec. 3461, Rev. Stat., unconstitutional, it emitted no error. The judgment of the court below will, therefore, be affirmed.

CORPORATIONS—INSOLVENCY—JUDGMENTS—COURTS.

[Cuyahoga Common Pleas, May 19, 1900.]

KIT CARTER CATTLE CO. v. E. M. MCGILLIN ET AL.

1. METHOD OF DETERMINING CAPACITY OF A CORPORATION.

General legislation of the sovereignty creating a corporation is not determinative of the power or capacity of a corporation, but the language of its charter is so determinative. Therefore, in determining whether a corporation has a given capacity, reference must be had to its organic form, as evidenced by its charter.

2. POWER TO CONVEY—SEC. 3239, REV. STAT.

Under sec. 3239, Rev. Stat., relating to the organization of corporations, there is no power conferred to convey property beyond the requirements of the corporation to effect the objects of its incorporation.

3. DISABILITY TO PREFER CREDITORS.

The disability of an Ohio corporation to prefer creditors after it becomes insolvent and ceases to prosecute the objects of its creation, is organic; and from the moment of such insolvency all power to convey its property ceases, and all its property becomes a trust fund, held by the directors as trustees: first, for the creditors; second, for the shareholders. And the claim of creditors will be enforced by converting all persons, except *bona fide* purchasers for value, into trustees, and compelling them to account for the property.

4. POWER TO PREFER CREDITORS IN ANOTHER STATE.

Where the disability of an insolvent corporation to prefer creditors is organic, it has no power in another state to prefer creditors, although its property is located there, and such preference is not forbidden by the laws of such other state.

5. WHEN JUDGMENTS CAN BE ATTACKED IN A COLLATERAL PROCEEDING.

Where such an insolvent corporation attempts to prefer creditors by giving notes, which notes are reduced to judgment, such judgments are collusive and fraudulent and can be attacked in a collateral proceeding.

6. JUDGMENTS BASED UPON NOTES GIVEN TO PREFER CREDITORS.

Where certain creditors of an insolvent corporation bring an action to set aside judgments based upon notes given by such corporation to prefer creditors, the adjudication of such issue cannot affect the rights of other creditors who had no part therein.

7. WHEN A CORPORATION WILL BE DECLARED INSOLVENT.

A corporation whose assets are only one-fifth of its liabilities is insolvent.

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8. BURDEN OF PROOF IN PROCEEDINGS BY JUDGMENT CREDITOR.

In proceedings by a judgment creditor to reach assets of the debtor, the burden of proof is on the plaintiff to show that the assets mentioned are the property of the judgment debtor.

9. THE PROBATE COURT IS A COURT OF RECORD.

The probate court is a court of record, competent to decide upon its own jurisdiction, and its records import absolute verity.

10. THE PROBATE COURT MAY APPOINT A TRUSTEE.

A probate court in this state has power to appoint a trustee of an insolvent corporation, provided such insolvent has property within the state.

11. PROCEEDING IN AID OF EXECUTION.

In a proceeding in aid of execution to reach choses in action based on a transfer of property, any creditor of the transferee may intervene to have such transfer set aside on the ground of fraud; it is not necessary in such case that the intervening party be a judgment creditor.

NEFF, J.

In the case of the Kit Carter Cattle Company against E. M. McGillin et al., which is here before us, the plaintiff filed a petition in which it sets up a certain judgment theretofore obtained by the plaintiff against Edward M. McGillin, in the sum of \$68,920.60.

An averment is further set out in the petition to the effect that Samuel Weil is indebted to the defendant company in a large amount, to-wit, the sum of \$40,000, being the balance of the purchase price of a certain stock of dry goods and other property sold by said defendant company to said Weil, which indebtedness is evidenced by certain non-negotiable promissory notes.

The petition then avers or sets out the relationship subsisting between the McGillin Company and other defendants named in the petition; the specific averment, or the material averment being that the \$40,000 so evidenced by non-negotiable promissory notes, is the property of Edward M. McGillin, the judgment debtor, and prays that the said Weil may be directed to pay such sum to the plaintiff.

An amended petition is filed, but it contains no averments additional to those contained in the petition, that are in any way material in my judgment, and hence I pass the amended petition.

To the petition of the plaintiff an answer is filed by W. J. McGillin, and, while its allegations are numerous, I deem it unnecessary to make any reference to them at this stage, except to say that they make an issue as to the ownership of this money.

M. C. McNab became a party defendant and filed a cross-petition as trustee of the creditors of the McGillin Company; but it is unnecessary at this stage to call attention to its contents.

Jacob New, Frederick S. Pinkus, Peter K. Wilson, and others, creditors of the E. M. McGillin Co., also became parties and filed answers to the cross-petition, to-wit, an answer and cross-petition by New, Pinkus, Wilson, Sigel, and others; and an answer by W. J. McGillin, the brother of E. M. McGillin, and numerous other pleadings were filed;

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but, at the present time, it is unnecessary to call attention to them other than to the direct issues as between the plaintiff and E. M. McGillin and those who stand with him or occupy practically the same relation to the facts in this case as he does.

Now a word as to the chronological order of events leading up to the final facts in respect to this case.

The E. M. McGillin Company was organized on December 29, 1891, with E. M. McGillin as its president. It did business in Youngstown, Ohio, until September, 1895, when the bulk, if not all, of the stock was moved to Pittsburgh and there the company engaged in a very large and extensive dry goods business, retaining, however, an office in Youngstown. The company did business in Pittsburgh until April 18, 1896. On March 1st the company applied for and received a certificate under and by virtue of the act of the Pennsylvania legislature, contained in the "Acts of the legislature of Pennsylvania Laws of 1874." And I might, perhaps, as well refer to that act here as later on.

The purpose of the act is to prevent foreign corporations from doing business in the state of Pennsylvania, without having any place of business or authorized agent therein. It is sufficient to call attention to the substance of this act: "Foreign corporations not to do business in the state without office and agent." And the purport of the statute is made apparent by its title.

On March 1, 1896, or thereabouts, a certificate was issued to the E. M. McGillin Company at Pittsburgh. On April 10, 1896, a resolution was passed by the directors of the company, providing for the giving of *cognovit* notes to various parties, and is Exhibit "A" as it appears in the record, as follows:

"PITTSBURGH, PA., April 10, 1896.

"At a special meeting of the directors of the E. M. McGillin Company held in pursuance of a call from the president at the store-room of the corporation, 611 to 621 Penn. Avenue, Pittsburgh, it was moved and seconded and unanimously resolved that whereas the corporation of the E. M. McGillin Company is indebted for borrowed money, merchandise, etc., which it is at present unable to pay, the president be instructed and empowered to sign, execute and deliver judgment notes to the following named persons, viz.:

" William J. McGillin, Imperial, Chase Co., Nebraska.....	\$23,600 00
A. E. Shade & Company, Cleveland, Ohio.....	4,350 00
Arbuthnot, Stephenson & Co., Pittsburgh.....	1,400 00
Second National Bank of Pittsburgh and T. Mellen & Sons,	
Pittsburgh, amounts at present unknown, for which reason the note shall be executed to Mary B. O'Neill in trust	
: for them for.....	20,000 00

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"All of which said notes to be payable one day after date. No further business of importance being before the board an adjournment was voted.

"(Signed) E. M. McGILLIN, President.

"M. B. O'NEILL, Secretary."

Notes pursuant to the resolution as adopted were made by Mr. E. H. McGillin as president of the company and retained by him until April 13, at which time these notes were delivered by Mr. McGillin to A. V. D. Watterson and he caused judgments to be entered on them on April 13th. Levy of execution was made upon practically all the stock of goods in the store on April 13th. Shortly thereafter, or on April 18th, an agreement of the creditors in whose favor judgments had been taken, was entered into which appears on page 459 of the record. This is an agreement executed by the various parties to whom or in whose interest judgment notes were given. It begins with a recital of the facts that the company had executed and delivered certain judgment notes to the parties, reciting the various notes named in the resolution, together with the amounts for which those notes were given. A recital then follows of a stipulation that Mr. Watterson shall represent these creditors at the sheriff's sale, not permitting the property to be sold for less than \$20,000. That the property, so by him purchased, by virtue of this agreement shall be placed by the sheriff in the possession of Walter S. Mitchell who shall be a trustee for the parties to this agreement. The stipulation then empowers Mr. Mitchell to employ competent parties to manage and carry on the business, etc. It then provides for the payment of the various judgments in a specified order. But, after the payment of the various parties except W. J. McGillin, it is agreed by said other parties hereto that when these claims shall be paid, Walter S. Mitchell is to execute a bill of sale to Mr. McGillin of all property not sold by him and they shall have no other interest nor demand thereupon. There are various stipulations as to various other parties to this agreement, but it is needless to call attention to them as they are not material.

The goods were sold under the execution issued upon the judgment so taken, for a total sum of \$20,820.88.

On July 13, 1896, pursuant to the stipulations of the agreement among the judgment creditors, to which I have called attention, Walter S. Mitchell, acting as trustee, gave to E. M. McGillin, attorney-in-fact of W. J. McGillin, a bill of sale which appears upon page 458 of the record:

"For and in consideration of one dollar, and other valuable considerations, I hereby sell, assign, and transfer, and set over all the fixtures, merchandise and personal property of every variety, located in the premises Numbers 611 to 621 Penn Avenue, Pittsburgh, to E. M. McGillin,

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attorney in fact for William J. McGillin. This bill of sale being made in accordance with agreement of April 18, 1896, between Mary B. O'Neill, W. J. McGillin, O. E. Schade & Co., Arbuthnot, Stephenson & Co., Second National Bank, and T. Mellen & Sons.

"Witness my hand and seal this 18th day of July, 1896.

"W. S. MITCHELL, Trustee. (SEAL.)

"Attest: A. V. D. WATTERSON."

The other judgment creditors were paid in full. E. M. McGillin then opened his store in Pittsburgh, or reopened it, in the name of W. J. McGillin. Mr. Mitchell ran the store some three months. The business was conducted in the name of W. J. McGillin for about two weeks. The store was then opened in Cleveland under the name of the "E. M. McGillin Dry Goods Company," a corporation of that style having been organized. On or about March 1, 1898, the entire stock of goods in the store in Cleveland was sold to one Samuel Weil for \$52,000. About \$18,000 appears to have been paid out on current debts made by the McGillin Dry Goods Company, and the remainder evidenced by non-negotiable notes which represent the funds in the hands of the clerk of this court, which now await an order of distribution in this case.

Going, first, to the claim of the plaintiff, The Kit Carter Cattle Company, the averment generally is, that the fund in question belongs to Edward M. McGillin and is, therefore, a fund which can be subjected to the payment of the debt of the Kit Carter Cattle Company. This is denied on the part of W. J. McGillin and every other defendant to whom such prayer is adverse.

The question, then, arises as to the claim of the plaintiff. Is the fund in the hands of the clerk, the property of E. M. McGillin? Under this issue the burden of proof would devolve upon the plaintiff to establish by a preponderance of the evidence, that the fund is the property of Edward M. McGillin.

A large mass of evidence has been taken, making a record of not less than six hundred pages, including the exhibits, documents, deeds, contracts, etc. And without going into detail, or undertaking to analyze the testimony, it is very clear to the mind of the court that there is very little evidence tending, in the slightest degree, to show that Edward M. McGillin is the owner of the fund in question, while there is an overwhelming mass of evidence adduced both by defendants and the cross-petitioners, the direct and logical effect of which is to establish clearly and uncontestedly that E. M. McGillin is not the owner of the fund in question. The only ground upon which it can be argued with the slightest plausibility that E. M. McGillin is the owner of the fund, is that he was the acknowledged head and manager of the business in which the McGillins were engaged. But the whole trend and mass of the evidence, indeed, every act that was done, every contract that was made, every

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transaction which was entered into and carried out, all the dealings, indeed, every circumstance almost, connected with the business of the E. M. McGillin Company since 1891, when the company was organized, distinctly, pointedly and decisively refutes such a contention.

In view of these facts, the court is disposed to hold that the averments of the petition are not established by a preponderance of the evidence.

While there are, doubtless, many circumstances that would tend to support such claim, yet the court can not, by a preponderance of the evidence, find that Edward M. McGillin was the owner of that fund. To so find, would be to ignore practically all the evidence bearing upon that fact.

The petition of the plaintiff must, therefore, be dismissed.

Second—As to the answer and cross-petition of M. C. McNab, trustee, in trust for the benefit of the creditors of the E. M. McGillin Company. Mr. McNab, as I say, having become a party defendant, files a cross-petition in which he avers that the E. M. McGillin Company made an assignment to A. V. D. Watterson; that the residence of the E. M. McGillin Company was in Mahoning county, Ohio. That neither the original deed of assignment nor a copy thereof was filed in the probate court of Mahoning county, Ohio, within ten days after the delivery of said assignment, nor at any other time, and that no bond was ever given by Mr. Watterson, as required by the statute, for the faithful performance of his duties as such assignee. That on or about May 12, 1897, certain creditors of the E. M. McGillin Company filed a copy of the deed of assignment in the probate court of Mahoning county, and, upon the application of said creditors, the probate court, having jurisdiction of such creditors, removed Mr. Watterson as assignee, and, in his place, appointed M. C. McNab as trustee in trust for the benefit of the creditors of that company. Then follows an averment that the company was engaged in business in Pittsburgh. And it is also averred that on April 10, 1896, the company was hopelessly insolvent, and unable longer, on account of its insolvency and lack of credit, to carry on its business, or to further prosecute the purposes and objects for which it was incorporated. That the company was then very largely indebted, and a large amount of its debts then due, which it was unable to pay, and that at that date the indebtedness of the company was very much more than the value of all of its property. That by reason of these facts, said defendants, E. M. McGillin, Mary McGillin and Mary B. O'Neill, as directors of this company, became trustees of all of its property, for the benefit of all the creditors of said corporation, and as such, were required to so manage, and administer the remaining property of said corporation, as that the then creditors of said corporation should share equally therein, in proportion to the amount of their claims against the company, and to the end that no one creditor should obtain

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any preference or priority over the other creditors of the company, out of the property and assets of said company, and should honestly manage the property, so that all of it should be equally distributed among all of the creditors of the company, but that said defendants, E. M. McGillin, Mary McGillin and Mary B. O'Neill, in disregard of their duty as directors, did not thus manage and administer the property of the company (which is, an averment, perhaps, is a conclusion of law rather than of fact), but that they did, on or about April 10, 1896, conspire together to cheat and defraud the creditors of the company, and to hinder and delay them in the collection of their just debts against the company. It is then averred that these various cognovit notes were made by said defendants to Mary B. O'Neill and William J. McGillin, a brother of E. M. McGillin, for the amount of some \$40,000; that the judgments entered thereon in the court of common pleas of Allegheny county, Pennsylvania, and executions issued thereon and levied on all the property of the company, were a part of the scheme by which the property of the company was to be appropriated to and for the use of said defendants. That the property was sold. And following substantially the order of events such as I have related—averring, however, that all of the acts, thus done, were fraudulent, were done with the purpose of defrauding other creditors, and were collusive, and praying that the court declare that such proceedings be held for naught, and praying for such other and further relief as may be warranted. I have merely scanned this cross-petition.

To like effect, practically, a petition is filed by Jacob New and other creditors of the company, containing substantially the same averments as contained in the preceding.

Issue is made as to all the facts presented both by the cross-petitions of Mr. McNab, as trustee, and New and others, by the answer of W. J. McGillin. It is unnecessary to read it because it is a very long recital. It is not necessary at this time to recite all the various features or rather the issues presented by the answer, but reference will be made to them as I progress with the opinion in this case. But, at all events, it may be said that an issue of fact is made as to all the affirmative allegations of the cross-petitions, both as to McNab and New and others, such as to put the burden of proof upon the cross-petitioners. So that the issue is fairly made.

Numerous other answers were filed by other parties. But it is sufficient to call attention to the allegations of the petition of W. J. McGillin, for that makes the issue complete. Answers were filed to this and others, denying whatever affirmative matter was set up in such answer.

The claim of the cross-petitions may be stated thus:

First—That the E. M. McGillin Company was not indebted to W. J. McGillin in the sum of \$23,600, or in any other sum.

Second—That, therefore, the note given to W. J. McGillin by the E. M. McGillin Company, was without consideration and fraudulent,

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and made for the purpose of defrauding the creditors of the E. M. McGillin Company.

Third—And that the judgment entered in the Pennsylvania courts upon that note was collusive, fraudulent and void.

Fourth—That the notes given to W. J. McGillin, A. E. Schade & Co., Arbuthnot, Stephenson & Co. and to Mary B. O'Neill, in trust for the Second National Bank of Pittsburg, Pa., and for T. Mellen & Sons, Pittsburg, Pa., were given by E. M. McGillin in contemplation of insolvency for the double purpose of defrauding the other creditors of the E. M. McGillin Company and of preferring the creditors to whom or in whose interest such notes were made.

Fifth—That the E. M. McGillin Company was an Ohio corporation and had no power to make a valid preference of the creditors named and that the attempt so to do was null and void and inured to the benefit of all the creditors of the E. M. McGillin Company.

Sixth—That the judgments predicated on such notes were collusive, fraudulent and void.

Seventh—That W. J. McGillin acquired no valid title to the goods under the sale in Pennsylvania; that, in brief, he became and was a trustee for all of the creditors of the E. M. McGillin Company.

Eighth—That the fund in the hands of the clerk of this court should be prorated by the order of this court among the creditors of the E. M. McGillin Company.

Substantially these statements may be said to contain the contentions of the cross-petitions.

On the other hand, defendants claim :

First—That the E. M. McGillin Company was indebted to W. J. McGillin in the full sum of \$28,600.

Second—That the note for that amount to W. J. McGillin, was, therefore, supported by a sufficient, valuable and valid consideration.

Third—That the judgment entered on the note to W. J. McGillan is a valid judgment.

Fourth—That the judgments entered in favor of other creditors were valid.

Fifth—That the E. M. McGillin Company had full power to make the notes.

Sixth—And that the application of the corporate property to the payment of such judgments was valid.

Seventh—That W. J. McGillin acquired a good and indefeasible title by virtue of the sale in Pittsburg upon the execution issued on such judgments, to such property as was sold.

Eighth—That Mr. McNab, as trustee, is not entitled to intervene in this action in behalf of the creditors of the E. M. McGillin Company.

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Ninth—That Jacob New and others who have filed an answer and cross-petition have no such *status* as to entitle them to relief in this action.

The right of McNab, as trustee, or of Jacob New and others, to intervene and to relief in this action, should first be determined; for, if, under the circumstances of this case, they are not entitled, in any event, to any beneficial relief, then it would be idle to consider any of the numerous other questions involved in this case.

First, then, as to trustee McNab. The E. M. McGillin Company is an Ohio corporation and, according to its certificate, is located in Youngstown, Mahoning county, Ohio. Section 6385, Rev. Stat., and sec. 6336, Rev. Stat., give to the probate court of the county in which a corporation or person resides, power to appoint a trustee upon failure of an assignee to file the assignment or a copy thereof within ten days from the date of the assignment. The evidence shows the failure of Mr. Watterson to appear in the probate court of Mahoning county with the original deed of assignment or a copy of it; and the record shows the appointment of Mr. McNab as trustee. Did the corporation reside in Mahoning county at the time? If so, the statute would have application. A case, cited in this connection, which seems to have been approved at various times, by many courts, is that of *Bank of Augusta v. Earle*, 38 U. S. (13 Pet.), 277, one of the branches of the syllabus being in this language:

"A corporation can exist only within the limits of the sovereignty which created it, but it may act elsewhere, and through agents, if the laws of other countries permit."

Upon this subject, Thompson on Corporations, sec. 7999, says:

"From the foregoing, and other authorities, we may deduce the modern rule that a corporation is a resident subject or citizen of the state in which it is created, no matter where its members or shareholders may happen to reside; and though it must be constituted of some place within the dominion of the government which creates it, and can have no legal existence beyond the boundaries of that state, must dwell in the place of its creation, and cannot migrate to another state, yet it may act by agents beyond the bounds where it thus exists."

It, therefore, is apparent that the E. M. McGillin Company was, by intentment of law, a resident of Mahoning county and the state of Ohio. The probate court is a court of record, competent to decide upon its own jurisdiction and its records import absolute verity. This is held in 16 Ohio St., 455, and the doctrine is stated in syllabi six and seven. To the same general effect is *Railroad Co. v. Belle Centre*, 48 Ohio St., 273. And also it is held by an assignment all rights of creditors pass to an assignee, in the second branch of the syllabus in *Hanes v. Tiffany*, 25 Ohio St., 549, and in *Blandy v. Benedict*, 42 Ohio St., 295.

It is urged in behalf of the defendants that Mr. Watterson was appointed in Pennsylvania; that there was no property in Mahoning-

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county, Ohio, belonging to the E. M. McGillin Company; and that, therefore, the probate court had no jurisdiction to remove Mr. Watterson and to appoint Mr. McNab. Mr. McNab was appointed trustee on May 12, 1897. If there was no property of the E. M. McGillin Company in this state at that time, then the right of the probate court to appoint a trustee was, at least, very doubtful. If, however, there was property of The E. M. McGillin Company in this state at that time, I have little doubt of the right and power of the probate courts of this state to administer upon such property.

The property or business of the E. M. McGillin Company was moved to this city (Cleveland) in September, 1896, and was, therefore, in this state at the time of Mr. McNab's appointment as trustee. If, in fact, that property was held by the new company here in trust for the creditors of the E. M. McGillin Company, such property would, in my judgment, confer power upon the probate court of Mahoning county to appoint a trustee to file an original assignment and to administer upon such property. This question, however, must depend, at last, upon what shall be determined as to the validity of the preferences made in Pennsylvania.

If the judgments founded upon such preferences, were valid, then there was no property in this state, of the E. M. McGillin Company, at the date of Mr. McNab's appointment as trustee. If such judgments were void, then there was property of the E. M. McGillin Company in this state at that time. This question must, therefore, be answered by and abide the determination of the validity of these preferential judgments.

Second—As to the right of Jacob New and others to intervene, it is objected that they cannot do so because they are not judgment creditors.

This question is settled, in my judgment, against the contention of defendants, by Combs v. Watson, 82 Ohio St., 228. I shall content myself with reading here the first branch of the syllabus:

"Under sec. 17 of the act regulating the mode of administering assignments in trust for the benefit of creditors, as amended February 12, 1863 (S. & S., 379), lands conveyed for the purpose of defrauding creditors inure to the benefit of such creditors; and any one of them, whether his claims be reduced to judgment or not, may bring an action to set aside such conveyance, and have the proceeds of the land applied to the payment of the creditors, as provided in said section."

This holding is reaffirmed by our own Supreme Court in State v. Moore, 42 Ohio St., 107; in Blandy v. Benedict, Id. 295, and also on page 299.

It is very strenuously urged by the cross-petitioners that the note to W. J. McGillin was without consideration and that, therefore, he acquired no valid title to the goods sold in Pennsylvania under execution. It should be remembered, however, that no such claim is

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made as to the notes given to the other judgment creditors in Pennsylvania. If these judgments were valid, then W. J. McGillin took a valid title to the goods at least to the extent of the judgments. In view of this situation, I deem it unnecessary at least at this time to pass upon the question as to whether the note given to W. J. McGillin was supported by a consideration.

We are now confronted by the question of the right or power of the E. M. McGillin Company to prefer certain of its creditors in the state of Pennsylvania.

First—Then, what are the facts? The articles of incorporation as they appear in plaintiff's "Exhibit A" and also in the record, recite that said corporation is to be located in the city of Youngstown in the state of Ohio and that its principal business shall there be transacted.

The E. M. McGillin Company on the day it gave the notes and caused judgments to be entered thereon, was indebted if we class W. J. McGillin as a creditor, to the amount of about \$100,000 in round numbers. Its entire assets sold for somewhat more than \$20,000. It was, therefore, insolvent. On April 10, 1896, the directors passed a resolution (which I have already read from page 188 of the record,) to prefer certain of its creditors and to execute its notes.

The answer of W. J. McGillin, on pages 2 and 3, admits that about the first portion of the month of April of that year it was discovered that the corporation could not continue to do business by reason of its lack of funds, and that at the special meeting on April 10, 1896, of the directors of the company held for that purpose, a resolution was passed by the board of directors empowering the president to sign, execute and deliver judgment notes as found in "Exhibit A" referred to.

On page 237 of the record, the question was asked of Mr. E. M. McGillin, the president of the E. M. McGillin Company, at what time in 1896 it became apparent to him that the company could not go on; and he replied that it was in March when the bank had notified him that they wished to withdraw the loan they had made.

On page 446 of the record, Mr. Watterson is asked, "When did you become satisfied from any facts that came to your knowledge, that the company could not go on?" His answer to this question was, "Well, along about the first week in April."

It, therefore, seems clear to me, that the company at the time of giving the judgment notes in question, was insolvent and had ceased to prosecute the objects for which it was created. In the next place, the judgments so taken, were not adversary judgments. The entire plan was conceived and carried out by Mr. E. M. McGillin and Mr. Watterson who then represented the E. M. McGillin Company and who seemed to have no retainer from the creditors who were sought to be preferred, with the exception, perhaps, of Mr. W. J. McGillin. On the contrary, it is conceded that under the laws of the state of Pennsylvania, corporations

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though insolvent and unable to pursue the objects and purposes of their creation, may validly prefer some of their creditors over others.

It is also apparent that all of the property of the corporation was located in Pennsylvania. Of the creditors preferred, all resided in Pennsylvania, except W. J. McGillin who lived in Nebraska and W. A. Schade who lived in this city. The creditors represented by Mr. McNab, trustee, resided apparently somewhere in the East,—it does not appear just where,—with the exception, perhaps, of a trifling obligation, too small to mention, in Youngstown, Ohio.

The evidence also shows that on March 9, 1896, the corporation, *The E. M. McGillin Company*, complied with the provisions of the act of Pennsylvania Laws, 1874, page 108, to which reference has already been made.

Under these circumstances, were the preferences valid or void? Of course, this question must be determined with reference especially to the two sovereignties involved, namely, the state of Pennsylvania and the state of Ohio. But numerous citations of authority have been made from other states and from federal courts as well, from which, perhaps, some general principles may be determined which have some bearing upon the determination of the question at issue.

In *Wait on Insolvent Corporations*, ed. of 1888, sec. 823, I find this language:

“Domicile of Corporation.—It is important in this connection to keep in mind the rules of law applicable to the subject of the domicile of a corporation. The New York court of appeals say: ‘We regard the principle to be too firmly settled by repeated adjudications of the federal and state courts to admit of further controversy, that a corporation has its domicile and residence alone within the bounds of the sovereignty which created it, and that it is incapable of passing personally beyond that jurisdiction.’”

Plimpton v. Bigelow, 93 N. Y. 598, supports the doctrine just stated. And also the old case of *Bank of Augusta v. Earle*, 38 U. S. (13 Pet.), 277, which is a pioneer case upon this subject, and from which I read the first branch of the syllabus:

“A corporation can do no acts and make no contracts, either within or without the state which created it, except such as are authorized by its charter.”

This case was, manifestly, decided when corporations did business under special charter. And, in the opinion in this case, is cited the celebrated case of *Dartmouth College v. Woodward*, 17 U. S., 4 Wheat, 686, where the same principle is again announced by the court.

“A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being a mere creature of the law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence.”

Also citing the case of *The Bank of the United States v. Dandridge*, 25 U. S. (12 Wheat.), 64:

"But whatever may be the implied powers of aggregate corporations by the common law, and the modes by which those powers are to be carried into operation; corporations created by statute, must depend both for their powers and the mode of exercising them upon the true construction of the statute itself."

In the *Canada Southern R. Co. v. Gebhard*, 109 U. S., 387, the court, in the opinion, say (citing some authorities) :

"A corporation must dwell in the place of its creation, and cannot migrate to another sovereignty," *Bank of Augusta v. Earle*, 88 U. S. (13 Pet.), 588, though it may do business in all places where its charter allows and the local laws do not forbid. *Railroad v. Koontz*, 104 U. S., 12. But wherever it goes for business it carries its charter, as that is the law of its existence (*Relf v. Rundel*, 103 U. S., 226), and the charter is the same abroad, that it is at home. Whatever disabilities are placed upon the corporation at home it retains abroad, and whatever legislative control it is subjected to at home must be recognized and submitted to by those who deal with it elsewhere."

Coming to our own state and, before we come directly to the question involved here, that is, the question as to what law controls and what is the rule to be determined by reference to the two sovereignties especially involved, we note the case of *Ewing v. Bank*, 43 Ohio St., 81; the second branch of the syllabus of which quotes *Bank of Augusta v. Earle, supra*:

"A corporation can make no contracts, and do no acts, either within or without the state which creates it, except such as are authorized by its charter."

On page 85, in the opinion, McIlvaine, J., uses this language:

"The plaintiff, however, being a corporation of this state, we must look to the general statute under which it was incorporated for its power to contract, and for the consequences which follow an abuse of its franchise in this respect."

And upon page 86: "Again, it is claimed by defendant in error, that the contract sued on was made in the state of Illinois, and that by the law of the place where it was made the rate of interest contracted for was authorized. Hence it is contended that the validity of the contract should be determined by the law of Illinois and not by the law of Ohio. If the contracting parties were natural persons, the rule thus contended for should, no doubt, prevail.

"But the defendant in error, which contracted for interest at the rate of ten per cent. per annum in the state of Illinois, was an Ohio corporation, whose power to contract for interest was limited by its charter 'to the rate allowed by the laws of Ohio,' which was a less rate than that

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contracted for." And here quoting from *Bank of Augusta v. Earle*, 38 U. S. (13 Pet.), 519.

"It may be safely assumed that corporations can make no contract or do no act, either within or without the state that creates it, except such as are authorized by its charter," which is the language used in the syllabus. "The reasoning which leads to this conclusion is unanswerable, and need not be restated here, as the proposition is very plain.

"We admit that by the rule of comity existing between states of the union, it may be assumed that the existence of the plaintiff below as a corporation of the state of Ohio, with such powers as were conferred by its charter, was recognized by the state of Illinois, so that a contract which it might make, within its charter, would be valid, though made in another state. But this rule of comity does not extend so far as to legalize a contract in excess of its chartered privileges made by a foreign corporation in another state, although such contract be authorized by the state where made as a legitimate exercise of power by its own citizens, whether natural or incorporated.

"Neither does this rule of comity exist in a state whose policy is violated by the exercise of powers conferred by the charter of a foreign corporation. In other words, powers conferred by a charter can not be exercised in a foreign state whose policy is thereby violated. So that, if it were shown that the laws of Illinois expressly authorized a foreign banking corporation to contract for interest at the rate of ten per cent. per annum, within the state of Illinois, the state of Ohio would not enforce a contract so made by one of its own corporations in violation of its policy as expressed in the charter of the corporation."

In *Strauss v. Insurance Co.*, 5 Ohio St., 59, first branch of the syllabus:

"Corporations have such powers, and such only, as the act creating them confers; and are confined to the exercise of those expressly granted and such incidental powers as are necessary for the purpose of carrying into effect powers specifically conferred."

Powers v. Wood Co., 8 Ohio St., 205, quoting from the opinion:

"The modern doctrine is to consider corporations as having such powers as are specifically granted by the act of incorporation, or as are necessary for the purpose of carrying into effect the powers expressly granted, and as not having any other."

In *McCormick v. Market Bank*, 165 U. S., 530, in the opinion we find this language :

"When the corporation is created by a charter granted by the legislature, any person dealing with it is bound to take notice of the terms of the charter, and of the general laws restricting or defining the powers of the corporation." And quoting numerous decisions.

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"In like manner, when the corporation is formed under general laws, by the recording or filing in a public office of the required articles of association and certificate, any person dealing with the association is bound to take notice of the documents recorded or filed, upon which as authorized and controlled by the general laws, depends the question of the corporation, the extent of its corporate powers, and its capacity to act as a corporation."

In Peebles v. Chicago Car Co., 130 Ill., 268, third branch of the syllabus, is this language:

"Charter of corporate powers under the general law—In what it consists.—The charter of a corporation formed under a general law does not consist of the articles of the association alone, but of such articles taken in connection with the law under which the organization takes place. The provisions of the law enter into and form a part of the charter."

The same doctrine is announced in Hutchins v. Coal Co., 4 Allen 582, after citing 38 U. S., (13 Pet.), 519, 589.

"It results from these familiar principles that when a corporation goes into a state other than that which operated it, and enters into a contract with the citizens of that state, it exercises, not a power or authority derived from the law of the place of the contract, but it acts solely by virtue of the rights conferred by the law of the place of its creation. Indeed, it has no other legal existence or power to act. It carries with it into every state or country where it may undertake to exercise its corporate functions, all the legal attributes and powers, and subjects itself and its members to all the duties and liabilities arising out of or imposed by the provisions of law under which it was originally created and established. It is, therefore, a fallacy to say that the binding force and obligation of a contract made by a corporation in a foreign state or country depend entirely on the local laws of the place where the contract is entered into. Such a statement is only partially true. The foreign law would doubtless regulate and govern the nature, interpretation and obligation of the contract in all respects, except so far as they depended on the extent of the powers conferred by the charter of the corporations upon the artificial person which it created. These a foreign state could neither enlarge nor abridge."

Numerous adjudications of various states, and also liberal extracts from text writers, have been cited by counsel for both sides, but they relate largely to contests between individuals or to adversary proceedings, and only serve to illustrate and enforce general principles of law, and have no direct or controlling effect upon the question involved in this case, and of that character are many of the cases to which I have called attention; and it would be a task almost infinite to analyze all the cases cited in the very able and elaborate briefs filed by counsel.

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The question at issue must be decided with special reference to the law of the two sovereignties involved, namely the state of Ohio and the state of Pennsylvania.

If there is a direct conflict, this court must determine which is the controlling law. If, however, there is no essential conflict of the law of the two sovereignties as applicable to the facts of the case, then this court should determine and ascertain what principle of law common to both jurisdictions, apply to such facts. This remits us to an examination of the cases cited by counsel on both sides—cases from the two states directly involved.

The first case cited, is *American Bible Society v. Marshall*, 15 Ohio St., 537. The syllabus is in this language:

"Where the terms of the charter of a corporation, created by the legislation of another state, are sufficiently broad to confer upon it a capacity to take and hold real estate by devise, although not expressly authorized so to take, a provision of the statute of wills of that state, that 'no devise of real estate to a corporation shall be valid, unless such corporation be expressly authorized by its charter, or by statute, to take by devise,' is operative only to the extent of disabling the corporation to take by devise real estate situate in that state and does not affect its power to take by devise real estate in Ohio."

If we look to the syllabus for the effect of this decision, the doctrine which it announces, turns upon the language, "Where the terms of the charter of a corporation, created by the legislation of another state, are sufficiently broad to confer upon it a capacity to take and hold real estate by devise." The opposite of this would be, if the doctrine of the syllabus went the other way: "Where the terms of the charter of a corporation, created by the legislation of another state, are not sufficiently broad to confer upon it a capacity to take and hold real estate by devise,"—in this, the holding would be the reverse of the former.

"That society, by the law creating it, is empowered generally to hold, purchase and convey such real and personal estate as the purposes of the corporation shall require, not exceeding the amount limited in its charter; and it is clear that, in the absence of any other restriction upon its powers, the word purchase is, in law, sufficiently comprehensive to include an acquisition by devise.

"It is insisted, however, by counsel for defendants-in-error, that the New York statute of wills, which provides, that, 'no devise of real estate to a corporation shall be valid unless such corporation be expressly authorized by its charter, or by statute, to take by devise,' operates to limit the effect of the word 'purchase' so as to exclude the capacity of the Bible society to take real estate by devise in any case. And in support of this position, the case of *McCarter v. Orphan Asylum Society*, 9 Cowen, 487, is cited and urged. We have no disposition, nor have we

any occasion to question the authority of that decision. That case was one in which a testator had attempted to devise real estate situate in New York, to a corporation not 'expressly authorized by its charter, or by statute, to take by devise,' though, like the Bible society, it was authorized to take by purchase. And it was held that, the provision of the statute of wills had the effect to exclude the capacity of the corporation to take by devise the land in that case attempted to be devised. But there is nothing in the case, fairly considered, to show that the court intended to go further than this. Indeed, it seems to us, it cannot, in reason, be claimed that the New York statute of wills can operate beyond the extent to which it was applied upon the facts of that case. It is a statute of wills. Its primary intent is to limit the capacity of testators to devise; and it is only incidentally that it affects the capacity of corporations to take by devise. Its operation and effect upon the capacity of corporations is measured and limited by the extent of its repugnancy to the claims of power and capacity which, but for its provisions, corporations might well make. And that repugnancy ceases just where the statute creating the repugnancy ceases to operate. Now, the New York statute of wills operates on property situate in, and controlled by, the laws of that state. Beyond the limits of that state it can have no effect. It is not to be presumed that the legislature of that state intended to go further; and if it did so intend, the assumption would be nugatory. The New York statute of wills, therefore, is not inconsistent, either in intention or in effect, with a claim of capacity by the Bible society, under the general provisions of its charter, to take by devise lands situate elsewhere than in New York."

Still harping upon the terms of its charter. This case, rightly understood, establishes the doctrine that, in determining whether a corporation has a given capacity, reference must be had to its organic form as evidenced by its charter. General legislation of the sovereignty creating the corporation, is not determinative of the power or capacity of a corporation, but the language of its charter is so determinative. The question of the power or capacity must be referred to this standard.

Another very interesting case cited by defendant's counsel is that of *Hall v. Coal & Iron Co.*, 11 Ohio Dec. Re., 71. The syllabus is in this language:

"A manufacturing corporation chartered in New York to own property and transact business in Ohio, may, when insolvent, by a deed executed in New York, make a general assignment for the benefit of creditors, which is valid to pass its real and personal property situated in Ohio, to an assignee, notwithstanding the fact that after it was chartered and entered upon its property and business in Ohio, a New York statute was enacted which in terms prohibited such corporations from making such assignments 'in contemplation of insolvency.' "

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I shall not undertake to read much of this opinion; but it should be noticed first, that the disabling act was passed after the New York corporation had begun to do business in Ohio. In the course of the opinion, I notice that the court uses this language:

"That we must look to the laws of the state creating a corporation, for its powers, is conceded as a general principle. But this rule must always yield to demand of local policy when dealing with foreign corporations." And reading a paragraph preceding that: (p. 72.)

"Comity, it seems, is inter-state courtesy; it is inter-state politeness; it is a disposition between the states to be neighborly; but there is no principle of comity that can give force to the law of another state to the prejudice of the rights of our citizens or in contravention of the policy of our state. It is certainly competent for any state to adopt laws to protect its own property as well as to regulate it, and 'no state will suffer the laws of another to interfere with her own; and in the conflict of laws when it must often be a matter of doubt which shall prevail, the court which decides will prefer the laws of its own country to that of strangers.'"

In *Ewing v. Bank*, 43 Ohio St., 31, to which I have already made reference; first and second branches of the syllabus, is the same doctrine.

Also in this connection, is *United States Mortgage Co. v. Sperry*, 24 Fed. Rep., 888,—syllabus:

"A corporation organized and authorized to loan money by a special act in New York, wherein it is provided no 'loan or advance shall be made at a rate of interest exceeding the legal rate,' is not prevented from charging interest on a loan made in another state at a rate in excess of that provided by statute in New York, but not in excess of the rate allowed by law in the state where the loan is made."

This is a very interesting case, just as the one referred to in *Ewing v. Bank*, *supra*, and, of course, if there be any conflict between this and *Ewing v. Bank*, *supra*, the latter case would control; but I will not undertake to examine that case.

The principal case in Ohio and which controls so far as this jurisdiction is concerned, is that of *Rouse, Trustee, v. Merchants' National Bank*, 46 Ohio St., 493. It is a very familiar case, and I suppose it is unnecessary to make any more than a hurried reference to it, as its language is universal and unconditional. I read the syllabus:

"Corporations—When cannot create valid preferences—Assignments by.—A corporation for profit, organized under the laws of this state, after it has become insolvent, and ceased to prosecute the objects for which it was created, cannot, by giving some of its creditors mortgages on the corporate property to secure antecedent debts without other consideration, create valid preferences in their behalf over the other creditors, or over a general assignment thereafter made for the benefit of creditors."

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The language of the syllabus, "A corporation for profit, organized under the laws of this state," not doing business in this state, but "organized under the laws of this state," is unconditional. If taken literally, this case would seem to settle the law as to this state.

The E. M. McGillin Company was a corporation for profit, organized under the laws of the state of Ohio, and, at the time of giving the judgment notes in question, was insolvent and had ceased to prosecute the objects for which it was created, and falls precisely within the category named in this case. This feature of the syllabus seems to have escaped the vigilance of counsel on both sides, because it has not been urged on the one side or combated on the other, although such vigilance has certainly been lynx-eyed and microscopic.

But our Supreme Court had under consideration an attempted preference by an Ohio corporation within the state, and it might, therefore, be contended that the court did not intend to announce the proposition as a universal, unconditional one, or as applicable to an Ohio corporation doing business in a state which permits preferences by failing corporations.

Or if we treat this syllabus in another way and read it in connection with the syllabus of *Ewing v. Bank*, 43 Ohio St., 31, *supra*, that "A corporation can make no contracts, and do no acts, either within or without the state which creates it, except such as are authorized by its charter," the inference seems almost irresistible, that the E. M. McGillin Company had no power to make the preferences in question, so far as the law of Ohio is concerned. But waiving this construction, which may be pushing the niceties and subtleties of verbal interpretation to extremes, let us look to the facts and reasoning of the court in the case of *Rouse v. Bank*, 46 Ohio St., 493.

After stating the general claims of the parties, the court distinguishes the case under consideration from one dealing with an individual debtor who has complete dominion and consequent unrestricted power of disposition of his property; and the doctrine is stated, "that when a corporation for profit, organized under the laws of this state, becomes insolvent and ceases to carry on its business or further pursue the purposes of its creation, the corporate property constitutes a trust fund for the equal benefit of the corporate creditors, in proportion to the amounts of their respective claims; and that it cannot then, by pledge or mortgage of the property to some of its creditors as security for antecedent debts, without other consideration, create valid preferences in their behalf, over the other creditors, or over an assignment thereafter made for the benefit of creditors."

And, if Judge Williams is correct in making this distinction, then the case of *Green v. Van Buskirk*, 74 U. S. (7 Wall.), 139-152, cited by defendant's counsel, can not be authority here, for that controversy was between individuals having complete dominion over their property, and,

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besides, the proceedings were adversary in their character. The contest there was between a mortgage on chattels given in New York and an attachment levied upon property actually in Illinois.

It is perfectly apparent that a sovereignty has complete dominion over property within its borders. There can be no doubt about that.

Rouse v. Bank, supra, at 500 : "Corporations generally do not possess such exemplified powers, and especially those created under the laws of this state. In this state, corporations have not the same powers and capacities as natural persons, but are authorized for specified and defined purposes. They are clothed with those attributes only, with which the law, under which they are created, invests them, and can exercise no powers, not expressly conferred; or necessary to carry into effect those in terms granted."

And the court, in its opinion further, comments on the general points and discusses the question and calls attention to the fact that the directors are trustees both for the shareholders and the creditors, and that preferences would operate equally to the disadvantage of creditors and shareholders and are, therefore, void; quoting the most radical language and that contained in *Wait on Insolvent Corporations*, 162 :

"The practical working of the rule sustaining corporate preferences is monstrous. The unpreferred creditors have only a myth or shadow left to which resort can be had for payment of their claims; a soulless, fictitious, unsubstantial entity that can be neither seen nor found. The capital and assets of the corporation, the creditors' trust fund, may, under this rule, be carved out and apportioned among a chosen few, usually the family connections or immediate friends of the officers making the preferences. This rule of law is entitled to take precedence among the many reckless absurdities to be met with in cases affecting corporations, as being a manifest travesty upon natural justice."

The quotation of that authority, with approval, would seem to me to leave no doubt as to the law in the state of Ohio.

But, inasmuch as the E. M. McGillin Company was doing business in the state of Pennsylvania at the time; that all of its property was there; that that state permits preferences to be made; reference must be had to the law of the state of Pennsylvania. Upon this subject, three cases are cited by counsel for defendant. The first case cited is that of the Fairpoint Mfg. Co. v. Optical & Watch Co., 161 Pa., 17; the second branch of the syllabus is in this language:

"Where no disability to make a preference of one creditor before another is imposed upon a foreign corporation by its charter, the prohibition of such a preference by a general enactment of the state where the corporation is chartered, can have no extra-territorial effect."

The inference would seem to be, that, if a disability is imposed upon a foreign corporation by its charter, no preference can be made in the state of Pennsylvania. In the opinion, the court say :

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"The reasons assigned in the petition, and on which the order is based, are that the judgments of the appellant and others effect preferences, and are therefore fraudulent in law, and that a sale by the sheriff would cause a sacrifice of the property and a distribution of the proceeds in violation of the rights of the plaintiffs in the bill and other creditors. The statement that the judgments are fraudulent in law is evidently founded upon an averment in the bill that the defendant is a New Jersey corporation, and that the laws of that state regulating corporations provide (Sec. 80): 'In payment of the creditors and distribution of the funds of any company the creditors shall be paid proportionately to the amount of their respective debts, except mortgages and judgment creditors, when the judgment has not been by confession for the purpose of preferring creditors.'"

And after thus quoting, the court say:

"No actual fraud is alleged, and the claim that the judgment is legally fraudulent is based entirely upon the fact that it works a preference in a manner forbidden by the statute of New Jersey.

"The New Jersey act does not make unlawful the preference of a creditor by an insolvent corporation except when effected by means of a confessed judgment: *Wilkinson v. Bauerle*, 41 N. J. Eq., 635; *Vail v. Jameson*, 41 N. J. Eq., 646.

"No disability to make a preference is imposed upon this corporation by its charter, and the prohibition by a general enactment can have no extra-territorial effect. Not being forbidden by the organic law of the corporation, the legality of the act must depend upon the law of the state where it is done. In Pennsylvania an insolvent corporation may prefer a creditor by a confession of judgment. *Lake Shore Banking Co. v. Fuller*, 110 Pa., 156."

"Not being forbidden by the organic law of the corporation, the legality of the act must depend upon the law of the state where it is done."

The reverse of this proposition would be: If forbidden by the organic law of the corporation, the legality of the act must depend upon the law of the state creating the corporation. That would follow as a corollary.

The next case in the series cited by counsel for defendant, is *East Side Bank v. Columbus Tanning Co.*, 170 Pa., St. 1. I will first read the first branch of the syllabus:

"The directors of a New York corporation at a meeting held in New York authorized the president of the company to prefer a New York creditor by confessing judgment to him in Pennsylvania, although the corporation was at the time insolvent, and the laws of New York forbid preference by corporations upon the eve of insolvency: Held, that, distribution was properly awarded to the execution creditor."

On page 2 we find a recital of the facts: "From the record it appeared that the Columbus Tanning Company is a corporation of the

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state of New York, and the East Side Bank a banking corporation, organized under the laws of New York. All of the property, real and personal of the Columbus Tanning Company is situated in Warren County.

"On August 24, 1893, a note, with warrant of attorney for confession of judgment for \$11,500 due on demand, was signed at Warren, Pennsylvania, by Columbus Tanning Company, by David C. Taylor, president, in favor of said East Side Bank. On the same day a *fieri facias* was issued on said judgment and the personal property of defendant in and about its tannery at Columbus was levied upon. This personal property consisted of bark, hides, tools, liquors in vats, leather, etc.

"Subsequently, and before the sale by the sheriff, the Chautauqua County National Bank of Jamestown, N. Y., Warren Savings Bank and others, issued writs of foreign attachment against said Columbus Tanning Company, and attached the property previously levied upon by the sheriff under said writ of East Side Bank, as well as the real estate of said company.

"Subsequently the personal property so levied upon was sold by the sheriff, and the real estate of the Columbus Tanning Company was sold by the sheriff upon a writ issued on said judgment of the East Side Bank, and the fund realized from both sales was, at the instance of the several creditors, brought into court for distribution, and George N. Frazine, Esq., was appointed auditor.

"The indebtedness of the Columbus Tanning Company to the East Side Bank was incurred in the city of New York by loan by said bank to said company.

"All the proceedings looking to the giving of the note and the entry of judgment thereon and the issuing of execution were had in New York City on August 22, 1893, at which date the board of directors held a meeting in said city and passed a resolution authorizing its president to execute the note with warrant of attorney for the confession of judgment therein. In pursuance of the authority so granted in the city and state of New York, David C. Taylor went to Warren, Pa., and there executed the note in question."

On page 4, the court say: "But we are not satisfied that Taylor was without lawful authority. That the general statutes of New York do not and cannot operate to control the distribution of the property of a New York corporation, not situate in that state, is conceded. This being so, we must construe the statute as intended to operate only in respect to property subjected to the control of the New York authorities. Or, if the language does not admit of such construction, so much of the law as is beyond the power of the legislature to enforce and which undertakes to deal with matters over which it has no jurisdiction is void. A mere *brutum fulmen* is not a law: It may be that the statute operates

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upon the corporation and not merely upon its property ; but it so operates only in respect to the property subject to New York control."

No reference is made in this case to the decision reported in 161 Pa., 17. Either the court in this case conceived that it was not holding contrary to the doctrine of that case, or overlooked that case, because it does not refer to it, or overrule it, or attempt to distinguish it.

The next case cited is Borton, etc., v. Brines-Chase Co. et al., 175 Pa. St. 209. The second branch of the syllabus is as follows :

"Inasmuch as the New Jersey act of March 5, 1895, prohibiting assignments for creditors and confession of judgments on the part of an insolvent corporation, does not go to the organic power of the corporation, but affects only the remedy, it is of merely local application and has no effect upon New Jersey corporations doing business in this state. The act does not apply retroactively to corporations chartered under the law as it existed before the passage of the act."

The court say on page 211 : "Assuming, even, that the act of 1895 prohibits the confession of judgments or a general assignment for the benefit of creditors, we do not think that it can be made to apply retroactively to corporations chartered under the law as it existed before its passage."

The doctrine, it seems to me, arising from a fair construction of the Pennsylvania cases, may be stated as follows : If disability to prefer creditors is imposed by a charter of a foreign corporation, or if such disability is organic, then such foreign company cannot validly prefer creditors in Pennsylvania ; but if such disability arise out of the general statutes of the state of its creation, then such foreign corporation may validly prefer creditors in Pennsylvania.

Under the findings of fact already indicated, it is evident that if the law of Ohio is to control, then the preferences in this case were undoubtedly void.

On the other hand, if the law of the state of Pennsylvania is to control, the validity of the preferences must depend upon the question as to whether the E. M. McGillin Company was organically prevented from making such preferences. So that remits us to the final question, as to whether or not such disability is organic in its character.

Section 3282, Rev. Stat., under the head of corporations, provides : "(By what laws corporations shall be governed.) Corporations created before the adoption of the present constitution, and which have not, by election or some other act, come to be governed by laws since passed, shall be governed and controlled by the laws then in force, and the valid modifications thereof since or herein enacted ; other corporations now existing or hereafter created shall be governed and controlled by the provisions of this title."

Section 3289, Rev. Stat., provides that, "Upon such filing of the articles of incorporation, the persons who subscribed the same, their asso-

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ciates, successors and assigns, by the name and style provided therein, shall thereafter be deemed a body corporate, with succession, and power to sue and be sued, contract and be contracted with, acquire and convey at pleasure all such real or personal estate as may be necessary and convenient to carry into effect the objects of the incorporation, to make and use a common seal, the same to alter at pleasure, and to do all needful acts to carry into effect the objects for which it was created."

Beyond the requirements of the corporation to effect the objects of its incorporation, there is no power to convey property. In other words, there is no general power to convey any corporate property.

This section, in the light of the holding in *Rouse v. Bank*, *supra*, and the reasoning of Judge Williams, settles uncontestedly and finally the question of preferences. The disability to prefer creditors after this corporation became insolvent and after it had ceased to prosecute the objects of its creation, was organic and was inter-tissued with the very fiber of its organic life.

As soon as a corporation has ceased to prosecute the objects for which it was created, *eo instantे*, by operation of law, all power to convey its property ceases, and, all property of the corporation becomes a trust fund and is then held by the directors as trustees: first, for the creditors of the corporation; and, second, for its shareholders.

The law of its organization or creation, therefore, gave the directors of the E. M. McGillin Company no power to prefer the creditors named.

The statute of Pennsylvania, Laws of 1874, page 108, does not purport to confer power to prefer creditors, but is restrictive in its terms. It imposes restrictions and conditions upon the exercise of power already possessed.

It follows, by inexorable logic and irresistible inference, that even under the laws of the state of Pennsylvania, the E. M. McGillin Company had no power to prefer its creditors, for the disability so to do was organic, not functional, grew out of the conditions of its creation, and was not referable, in any sense, to mere general laws. Besides this, it would be pushing the doctrine of comity to a very vicious extreme to hold that an insolvent Ohio corporation cannot prefer creditors, in contemplation of insolvency, in Ohio, and yet that it may go over the state line into Pennsylvania, and do that very thing by giving all of its property to certain creditors, and then call upon the courts of this state to make good the infamy by solemnly turning over to such preferred creditors such property of the corporation as happens to be in this state.

But let us look at this subject in the light of reason and natural justice.

Assuming that the E. M. McGillin Company was, at the time of moving the business to Pittsburgh, indebted to W. J. McGillin in the sum of \$23,600, still at the time of the attempted preference every ves-

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tige of property which his contribution had helped to purchase, had certainly vanished, and the property that was sold for \$20,000 was literally supplied by the very creditors who are now sought to be discriminated against by the preference of W. J. McGillin. The injustice of such a course is so glaring and so prodigious that it can find support in no accredited doctrine of equity or canon of ethics, or dictate of right reasoning. I, therefore, hold that such preferences were void.

But it is urged by the defendants' counsel, that judgments were entered on such notes in Pennsylvania, and that such judgments are not subject to collateral attack.

A judgment may be impeached for fraud or collusion. On this subject, Freeman on Judgments, sec. 334, says, speaking of judgments involved in issue of matter :

"They may impeach all facts involving fraud or collusion which were not before the court or involved in the issue or matter upon which the judgment was rendered. It is only third persons who have the right to collaterally impeach judgments. They are accorded this right because, not being parties to the action, any thing determined by it, as to them is *res adjudicata*."

And sec. 335 says : "What stranger may impeach. It must not, however, be understood that all strangers are entitled to impeach a judgment. It is only those strangers who, if the judgment were given full credit and effect, would be prejudiced in regard to some pre-existing right, that are permitted to impeach the judgment. Being neither parties to the action, nor entitled to manage the cases nor appeal from the judgment, they are by law allowed to impeach it whenever it is attempted to be enforced against them. Thus an assignee for the benefit of creditors may avoid the effect of a judgment against his assignor by showing that though it appears to have been entered before the assignment was made, it was in fact entered afterward."

Our Supreme Court has repeatedly, notably in Godin v. Canal Co., 18 Ohio St., 169, again in Combs v. Watson, 32 Ohio St., 228, and in McHugh v. State, 42 Ohio St., 154, 160, announced the doctrine that a judgment, collusively obtained, is subject to collateral attack.

And the same doctrine is laid down in Wait on Fraudulent Conveyances, sec. 74.

If confirmation of this proposition were needed, abundance is found in Meckley's Appeal, 102 Pa. St. 586, the very jurisdiction the judgments of whose courts have been assailed. And reading the second syllabus of this case, we have this language :

"Upon the distribution by an auditor of the proceeds of a sheriff's sale of real estate, lien creditors of the defendant in the execution may attack collaterally the validity, as to them, of a judgment, on the ground that it was confessed by collusion between both parties thereto, with intent to defraud defendant's creditors. If, in such case, an issue be not

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demanded, or be waived, the question whether the judgment was collusive, and therefore void as to creditors defrauded thereby, is a proper one for the auditor's determination."

The same doctrine is found in 115 Pa., 109, second branch of the syllabus; and also in 12 Ency. of Law, 148, note 3, and page 149.

The judgments being collusive and fraudulent, it follows that their validity may be attacked in the proceeding, and I, therefore, hold that they are the subject of collateral attack.

It is further urged on behalf of the defendants that the cross-petitioners are concluded by eleven creditors of the E. M. McGillin Company, contesting the validity of the several judgments obtained by the creditors who were sought to be preferred and who went into the courts of Pennsylvania and asked that a rule be granted to show cause why the fund realized by the sheriff's sale should not be paid into court and why a feigned issue should not be awarded to determine the material facts in dispute, relating to the distribution of the said fund. The court held against such petitioning creditors; and it is claimed that the cross-petitioners are barred by the holding of the court in this respect.

Whatever may be the effect of such holding as to the rights of such eleven creditors, it is clear that such holding could not operate to bar creditors who were not parties to such proceedings.

I, therefore, think it unnecessary to pass upon the effect to be given to such holding, for that question can only arise in relation to an order of distribution of the fund in dispute among the creditors of the E. M. McGillin Company.

It follows from what I have indicated above, that the property of the E. M. McGillin Company was, on April 18, 1896, a trust fund or trust property, held by the directors of the company in trust: First, for the creditors. Second, for the shareholders of the company.

The property being by operation of law, impressed with the trust, the law will enforce the claim of creditors by converting all persons, except *bona fide* purchasers, for value, into trustees and will compel them to account for the property. Perry on Trusts, secs. 826, 835 and 840.

If this doctrine be applied to the facts of the case, it results that the E. M. McGillin Dry Goods Company held the property which was sold to Weil, in trust for the benefit of the creditors of the E. M. McGillin Company.

The question next arises, how shall the extent or measure of such trust be determined?

The cross-petitioners claim that the trust property has been so intricably mingled with what might not be deemed trust property, as to render it indistinguishable; and they claim, as a corollary to this, that, by operation of law, the entire avails of the property have become subject to the trust. This contention is undoubtedly true if the fact be that

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no means of differentiating the trust property from its accretions exist. But I am disposed to think that sufficient data exist to enable the court to distinguish what is original and what is not original trust property with respect to the fund in question.

The property of the E. M. McGillin Company was sold at a sale which appears to have been fairly conducted, and the property sold for \$20,320.38. Competitive bidding was, in every way, encouraged, and every possible effort seems to have been made to realize the full market value from the property.

From the facts, I find that the sum of \$20,320.38, with simple interest thereon from the day of the sale in Pennsylvania to the date of the sale to Weil, would measure the interest of the creditors of the E. M. McGillin Company in the fund deposited with the clerk of the court.

Recurring to the question of the right of Mr. McNab to maintain the contention in the case as trustee of the E. M. McGillin Company, I am disposed to think, and I so hold that the facts that the residence of the E. M. McGillin Company was in Mahoning county, and that there was property of that company in this state at the date of his appointment, and inasmuch as Mr. Watterson had failed to file the deed of assignment, or a copy thereof, in the probate court of that county, that the probate court of that county had jurisdiction to appoint Mr. McNab, trustee, and that his appointment was valid.

A decree may, therefore, be taken dismissing plaintiff's petition and ordering a distribution of the fund in the hands of the court, as follows: \$20,320.38, together with interest from April 13, 1896, to date of sale to Weil, * * * to be paid to Mr. McNab as trustee, and the remainder to be paid to the stockholders of the E. M. McGillin Dry Goods Company, such costs as have been made by the plaintiff, to be paid by the plaintiff, and such costs as were incurred in resisting plaintiff's claims, to be paid by plaintiff; and as to the other costs, I am disposed to think that inasmuch as the creditors slept on their rights, they may be equally divided. The fund to be turned over to Mr. McNab for distribution.

A large mass of testimony has been taken as to whether W. J. McGillin is a creditor of the E. M. McGillin Company. In view of the length of time consumed in canvassing that issue, I am disposed to make a definite finding upon that question, rather than to put parties to the vexatious necessity of relitigating that issue.

Now, what are the facts in this case? Briefly related; for to go exhaustively into the *minutiae* of the evidence on the subject would be a task almost interminable. The principal facts relied upon by the cross-petitioners are:

First—That the books of the E. M. McGillin Company showed no entries of indebtedness to W. J. McGillin.

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Second—That E. M. McGillin's testimony, in stockholders' liability case, tends to show ownership of the Youngstown real estate in Mary B. O'Neill.

Third—That as it is claimed by cross-petitioners, \$7,000.00 of the avails of the real estate in Youngstown were used to pay for stock issued to Mary B. O'Neill.

On the other hand, the evidence shows that the real estate in question stood in the name of W. J. McGillin for many years, and was purchased by him with his own money, and that in all that was done with reference to it, and, while there was no motive to dissemble or to conceal the real facts, it was treated as the property of W. J. McGillin.

From examination of the evidence, I am disposed to think, and I hold that W. J. McGillin is a creditor of the E. M. McGillin Company in the sum of \$20,000 and is therefore entitled to participate in the distribution of the corporate fund to be turned over to the trustee.

Hill & VanDerveer, attorneys for plaintiff.

R. B. Murray, N. C. McNab, and *J. H. Clarke*, attorneys for cross-petitioners.

Foran, McTighe and A. V. D. Watterson, attorneys for defendants.

FRAUDULENT CONVEYANCES—ACTIONS.

[Superior Court of Cincinnati, General Term, April, 1900.]

Jelke, Smith, and Dempsey, JJ.

LOUISE F. JONES v. MARY G. LEEDS ET AL.

1. ELEMENTS OF A CONVEYANCE CONSTRUCTIVELY FRAUDULENT.

An existing creditor at the time of the conveyance, a voluntary conveyance of property of value, and an unsustained burden of proof to show grantor's solvency at the time of making such conveyance, are elements which go to make up a conveyance constructively fraudulent and within the class of cases covered by sec. 6344, Rev. Stat., authorizing action by creditors to declare void acts of an insolvent debtor.

2. INTENT TO HINDER, DELAY OR DEFRAUD IMPUTED TO THE PARTIES.

Where a conveyance by its terms operates to hinder, delay, or defraud creditors, the intent to do so is imputed to the parties, and no evidence of intention can change this presumption.

3. INADEQUATE CONSIDERATION WITHOUT INTENT TO DEFRAUD.

When there is no actual intent to defraud, a valuable consideration, though inadequate, will sustain the transfer in a court of law.

4. DEBTOR WITHIN THE MEANING OF THE STATUTE.

A party bound by a contract upon which he may become liable for the payment of money, although his liability be contingent, is a debtor within the meaning of the statute avoiding all grants made to hinder or delay creditors.

5. NATURE OF ACTION UNDER SECS. 6343 AND 6344, REV. STAT.

An action under secs. 6343 and 6344, Rev. Stat., to declare a conveyance and assignment for benefit of creditors void, is a civil action, equitable in its nature, and governed by the provisions of the code of civil procedure.

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JELKE, J.

The facts of the case which are without dispute, are as follows:

Mary G. Leeds on April 11, 1893, became endorser on a note on which plaintiff recovered judgment November 1, 1894, transcript of which was filed in the common pleas court and execution issued November 15, 1894, which was returned December 11, 1894, unsatisfied. Nothing has been paid on said judgment, and said defendant has no property or means to pay same. Defendant, Mary G. Leeds, together with her husband, conveyed to the defendant, Ella Leeds, their daughter, who is unmarried, and lives with them, the real estate sought to be reached, by a deed dated July 26, 1893, recorded September 30, 1893, the consideration named in said deed being "\$1 and other considerations." No actual consideration was paid by the daughter. The value of the property was \$800. The conveyance was made to her in consideration of her assuming a mortgage debt which stood on said property, and that was all. This mortgage debt, afterwards paid by said grantee, amounted to \$368. Mrs. Leeds had no other property or means out of which to pay this note or the judgment taken on it.

This action is brought under secs. 6343 and 6844, Rev. Stat., to declare the conveyance and assignment for the benefit of creditors void. An action under these sections of the statutes is a civil action, equitable in its nature, and governed by the provisions of the code of civil procedure. Brinkerhoff, etc., v. Smith, 57 Ohio St., 610.

"When there is no actual intent to defraud, a valuable consideration, though inadequate, will sustain the transfer in a court of law." Bump on Fraudulent Conveyances, sec. 265.

This action being equitable in its nature, the rule of equity prevails, and the court may allow the deed to stand as security for consideration actually paid, and appropriate the difference to the payment of the vendor's debts. Bump, sec. 265, *supra*, and cases cited.

The conveyance of the equity of redemption, valued by the uncontradicted proof at \$432, was voluntary.

Jamison v. McNally, 21 Ohio St., 295; Oliver v. Moore, 23 Ohio St., 473, third syllabus; Cramer v. Lepper, 26 Ohio St., 59.

Mary G. Leeds made the conveyance to her daughter after she, the donor, had become endorser on the note.

"In a multitude of cases it has been repeatedly adjudged that a party bound by a contract upon which he may become liable for the payment of money, although his liability be contingent, is a debtor within the meaning of the statute avoiding all grants made to hinder or delay creditors." Wait on Fraudulent Conveyances, sec. 90, and cases cited under Note 5.

"A contingent claim is as fully protected as one that is absolute. A liability as surety is within the statute as much as a liability as principal." Bump on Fraudulent Conveyances, sec. 503.

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"In an action by a creditor for the purpose of subjecting property in the hands of a donee to the payment of his claim, it being made to appear that the debt was contracted by the donor prior to the making of the gift, the burden of showing the solvency of the debtor at the time of making the gift rests upon the defendant." Oliver v. Moore, 23 Ohio St., 473.

The defendants offered no proof as to Mrs. Leeds' solvency, and there is no doubt that by the conveyance, plaintiff's note remaining unpaid, she became insolvent.

"The section, in terms, applies to all conveyances made with intent to hinder, delay or defraud creditors. The question raised by the record is, whether, in order to bring a case within the operation of the section, the conveyance must have been an *actual* intent to defraud.

"The operation of the section is, in our opinion, as comprehensive as the power of the court to set aside conveyances, on the ground of their being made in fraud of the rights of creditors.

"Parties are presumed to intend the natural consequences of their own acts; and to the extent that a conveyance is formed to work a fraud to that extent is fraud presumed to have been intended. If the intent exists it is immaterial, under the statute, whether its existence is proved by evidence directly or is to be inferred, as a matter of law, from the nature of the transaction." Jamison v. McNally, *supra*; Bank v. Miller, 6 Circ. Dec., 1; Bank v. Trebian, 59 Ohio St., 316; Mass v. Miller, 58 Ohio St., 483, 503.

It is not necessary for the court to find any actual intention on the part of the grantor to hinder, delay or defraud creditors where a creditor was by reason of the conveyance hindered or delayed in the collection of his debt, the court should hold the conveyance constructively fraudulent. Loudenback v. Foster, 39 Ohio St., 203.

"Whenever the effect of a particular transaction with a debtor is to hinder, delay or defraud creditors the law infers or supplies the intent, though there may be no direct evidence of a corrupt or dishonorable motive, but on the contrary an actual, honest, but mistaken motive existed. The law interposes and declares that every man is presumed to intend the natural and necessary consequences of his acts; and the courts must presume the intention to exist, when the prohibited consequences must necessarily follow from the act, and will not listen to an argument against it. Hence, it has been remarked that where a conveyance, *by its terms*, operates to hinder, delay or defraud creditors, the intent to do so is imputed to the parties, and *no evidence of intention can change that presumption.*" Wait on Fraudulent Conveyances, sec. 9; Bump on Fraudulent Conveyances, sec. 242; Robinson v. Van Dolcke, 3 Dec., 107; Story's Eq. J., sec. 361.

We have here then an existing creditor, a voluntary conveyance of property of value, and an unsustained burden of proof devolving upon

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defendants to show Mrs. Leeds' solvency at the time of making such conveyance; which elements make a conveyance constructively fraudulent and within the class covered by the provisions of sec. 6844, Rev. Stat.

The court is therefore of opinion that the conveyance of the equity of redemption valued at \$432 is in effect an assignment for the benefit of all the creditors of Mary G. Leeds.

Judgment reversed.

Oliver B. Jones, for plaintiff in error.

Joseph T. Harrison, for defendant in error.

JURORS—AFFIDAVIT FOR NEW TRIAL.

[Superior Court of Cincinnati, Special Term, 1900.]

THOMAS J. CLERKE v. COMMERCIAL TRIBUNE CO.

DISQUALIFICATION OF JURORS—NEW TRIAL—AFFIDAVIT.

An affidavit in support of a motion for a new trial on the ground that certain jurors were disqualified, must show that neither the party making the affidavit nor his counsel knew of the disqualification complained of. Thus, an affidavit by the party complaining and one of his attorneys, where three were employed in his behalf on the trial, is not sufficient.

SMITH, J.

The plaintiff in this case recovered a verdict of one cent against the defendant in an action for libel.

He seeks to set aside the verdict on the ground that in the examination of the jurors upon their *voir dire*, his counsel asked whether any of them had any relatives, friends or acquaintances on the defendant paper or on any other paper published in Cincinnati. No answer being returned to this question, the plaintiff assumed that each juror answered it in the negative.

From affidavits submitted by plaintiff on the motion for a new trial, it appears that one of the jurors had acquaintances on the defendant paper and friends on some of the other papers; and that another juror had a relative on another paper.

As a matter of fact I do not think the plaintiff had been prejudiced by the presence on the jury of the two jurors whose conduct is complained of, one of whom it appears, if the evidence can be considered, voted in the jury room at first for a substantial verdict against the defendant.

But the condition of the record prevents me from granting the motion. The law is well settled in this state that where a new trial is sought on the ground that a juror is disqualified (and I assume that the same rule would apply with respect to some defect in the qualifications of the juror which would not be ground for challenge for cause, but might induce a

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party to challenge peremptorily), the party making application for the new trial must show that neither he nor his counsel knew of the disqualification or defect complained of. *Eastman v. Wright*, 4 Ohio St., 156.

In this case one of the counsel for plaintiff has filed an affidavit that he did not know the answers of the jurors were incorrect; but there were two counsel for plaintiff in the case, and no affidavit to the same effect has been filed by the other counsel.

The plaintiff himself has also failed to file an affidavit that he did not know the answers were incorrect.

In view of the omission to file the affidavits of the party applying for the new trial, and all of his counsel that they did not know the answers were incorrect, under the authority of *Eastman v. Wright*, *supra*, the motion for new trial must be overruled.

J. G. O'Connell, and *James N. Ramsey*, for plaintiff.

T. M. Hinkle, for defendant.

NEW TRIAL—VERDICT—JURY.

[Cuyahoga Common Pleas, April 7, 1900.]

HENRY M. BRIGGS v. DESDEMONA L. ROWLEY.

1. NECESSARY ALLEGATIONS IN A PETITION FOR A NEW TRIAL FILED UNDER SEC. 5309, REV. STAT.

A petition for a new trial filed under sec. 5309, Rev. Stat., providing that the application for a new trial upon the ground of newly discovered evidence made after the term at which a trial of the action was had, may be made by petition filed as in other cases, must set out the issues upon the former trial and the evidence given thereon, together with the newly discovered evidence; setting forth merely the newly discovered evidence is not sufficient. It must appear, not only that the evidence was discovered since the trial, but that it is material and goes to the merits of the case.

2. EVIDENCE TO IMPEACH A WITNESS IS NOT NEWLY DISCOVERED EVIDENCE.

If the character of newly discovered evidence merely tends to impeach that of a witness upon a former trial, it is not newly discovered evidence within the meaning of the term, as used in sec. 5309, Rev. Stat., and will not avail as a ground for a new trial.

3. MISCONDUCT OF JUROR.—CONVERSATION TO A THIRD PERSON.

Where a juror listens to the conversation of an interested party addressed to some third person, which may have been prejudicial to a party to the case—as where a sister of plaintiff said within the hearing of a juror that she hoped the jury "would bring in a verdict for her sister as the defendant had done her a great wrong"—although such misconduct on the part of the juror is not a literal violation of the court's injunction to the jury—admonishing them not to suffer themselves to be addressed—certainly violates its spirit and purpose and constitutes a sufficient cause to warrant the court in granting a new trial, even though it is not shown, as a matter of fact, to have influenced the verdict.

NEFF, J. (Orally.)

The case of Henry M. Briggs against Desdemona L. Rowley stands upon a petition for a new trial under sec. 5309, Rev. Stat.

The main case was tried in this court in the September term of 1898, and was the case of Desdemona L. Rowley against Henry M.

Briggs. A verdict was rendered on November 30, 1898; motion for a new trial filed on the first day of December of that year, and the motion was overruled December 24, 1898.

The petition, as I have already said, is founded or filed under sec. 5309, Rev. Stat., which provides:

"When the grounds for a new trial could not, with reasonable diligence, have been discovered before, but are discovered after, the term at which the verdict, report, or decision was rendered or made, the application may be made by petition, filed as in other cases, not later than the second term after the discovery; whereupon a summons shall issue, and be returnable and served, or publication made, as prescribed in sec. 5050; the facts stated in the petition shall be considered as denied without answer; if the service be complete in vacation, the case shall be heard and summarily decided at the ensuing term, and if in term, it shall be heard and decided after the expiration of twenty days from such service; and the case shall be placed on the trial docket, and the witnesses shall be examined in open court, or their depositions taken, as in other cases; but no such petition shall be filed more than one year after the final judgment was rendered."

I have read the entire section of the statute.

The petition is predicated, first, upon the discovery of certain evidence, the tendency of which would be to discredit the statements of one, A. D. Leisy, an important witness of plaintiff at the trial.

The second subject to which the allegations of the petition relate goes to the question of misconduct of the prevailing party on the trial; the allegation being that one or more of the jurors were approached by a sister of Mrs. Rowley, one Kitty Bisbee, during their deliberations, as well as during the progress of the trial, and that certain statements were made by her, discreditable to the defendant, tending, as it is claimed, to influence the jury; and further, that the jury were actually influenced by such conversations, either addressed directly to them or purposely spoken in their presence with a view to influence their verdict in the case.

I say the first feature of the petition is addressed to the question of newly discovered evidence tending to throw discredit upon the testimony of Mr. Leisy, who swore that he came here to Cleveland prepared to bid upon the property; the testimony of the plaintiff being that there was an understanding or agreement between Desdemona L. Rowley and Mr. Briggs that he should bid it in for her and upon the payment of a certain sum, the property to be deeded over by him to her. Mr. Leisy, her father, was a witness in the case and testified to facts tending to establish evidence of a contract between them. Upon cross-examination, questions were put to him as to his preparation, as to what provision he had made for the payment; and, in the course of that examination, he made statements to the effect that he was abundantly prepared and had

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made provision which enabled him to bid upon the property, and that he was induced to refrain from bidding because of Mr. Briggs' agreement.

The first question that is raised—and it is a very interesting question because entirely new in this state, except as to the opinion of Judge Okey in *Moore v. Coates*, 85 Ohio St., 177, is a question of practice, as to what are necessary allegations in a petition of this character.

At first blush it would seem that the petition upon its face should make a cause of action; that is, the averments in the petition, taken alone, should constitute a cause of action, because a petition ordinarily must state in plain or concise language the facts constituting the cause of action.

The only averments here are as to testimony which has been newly discovered. There is no reference in the petition to the nature of the issues joined in the former action; there are no allegations setting out the substance of the testimony offered at the former trial; so that a court or judge other than the judge who sat at the trial of the case in the September term, would be utterly at a loss to determine the materiality of such newly discovered evidence. Is this testimony of a character such as to reasonably require a different verdict from that which was rendered?

It is insisted that inasmuch as there is no averment of the issues in that case, no attempt to set out evidence as introduced in the former trial, that this is an independent action, that, under the statute, it being heard after the term, the judge, before whom the former trial was had, may have died, and the deficiencies of the petition not being supplemented by notes or the memory of the judge who sat in the case; that, therefore, this petition is wholly and totally defective; in other words, that the allegations contained in this petition do not make a case for granting a new trial.

I say the question is new in the state of Ohio except as discussed by Judge Okey in *Moore v. Coates*, *supra*.

The language of Judge Okey being on page 186. I read from what he says in his opinion:

"A party, in my opinion, has his election to abide by his motion, where one has been properly filed, in which case he should be confined to evidence discovered during the trial term, and subsequently to the finding; or, where the case has been continued on such motion, and he discovers evidence subsequently to the trial term, he may abandon his motion and proceed by petition, which must contain the substance of the evidence offered on the trial, as well as that newly discovered, and show diligence," citing *Sanders, Admx., v. Loy*, and *Shigley v. Snyder*, 45 Ind., 229, 548.

In the case thus cited, *Sanders, Admx., v. Loy*, the syllabus is in this language,—I am now reading the second branch of the syllabus:

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"New Trial—Complaint.—An application for a new trial on the ground of newly discovered evidence, made after the term at which a trial of an action has been had, is a new and independent proceeding and is by complaint, which must state the evidence given on the trial and that newly discovered, and an issue must be formed, tried, and determined, and the evidence upon such trial, to become part of the record, must be made so by bill of exceptions."

In the opinion, on page 230, I find this language:

"When the application is made after the term by a complaint, the proceeding is a new and independent one, and cannot be fastened upon the former proceeding, which had already resulted in a judgment, and was no longer pending in court. The application, when made after judgment and at a subsequent term of the court, must, as we have seen, be regarded as an independent proceeding, and must set out the issues upon the former trial and the evidence given on such trial, with the newly discovered evidence. An issue must be formed on the complaint, and the issue thus formed must be tried by the court. Upon such trial the plaintiff should introduce in evidence the record of the former trial, prove what the evidence was upon such trial, the newly discovered evidence, and show that it had been discovered since the term when the case was formerly tried, what diligence he had used to discover the evidence before the former trial."

The statute upon which this decision is predicated is precisely similar to our own, being found on page 215, of Garvin & Hord's Statutes of Indiana, the edition of 1862.

The only difference that I am able to discover between that statute and our own is that the Indiana statute contemplates the filing of an answer. Our statute dispenses with the filing of an answer but provides that the issue shall be complete upon the filing of the petition. I think the issue is as complete in the one instance as in the other. That is to say, by intendment of law the issue is made up by force of the statute and without answer. So that it seems to me, that the mere additional feature in the Indiana statute providing for an answer, does not essentially change the nature of the issue; as, for instance, the issue which our code makes as to any affirmative averment in a reply is as complete as an issue made by a distinct pleading. Hence, I think there is nothing in that difference between the Indiana statute and ours, that would vary the operation of the principle or change it in the least.

Later, or earlier rather, in 25 Ind., 236, and also in 61 Ind., 104, the same doctrine is announced, the same practice followed and approved under the Indiana statute.

In Nebraska they seem to have a statute, or had a statute very similar to our own, which is found in the common statutes of the state of Nebraska, 1881, in the published edition of 1887, sec. 818, page 780:

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"Section 318. Newly discovered grounds.—Where the grounds for a new trial could not, with reasonable diligence, have been discovered before, but are discovered after the term at which the verdict, report of referee, or decision was rendered or made, the application may be made by petition filed as in other cases; on which a summons shall issue, be returnable and served, or publication made as prescribed in sec. 79. The facts stated in the petition shall be considered as denied without answer," (Being the same in that respect, and practically in all other respects, as in our own statute.) "and if the service shall be complete in vacation, the case shall be heard and summarily decided at the ensuing term. The case shall be placed on the trial docket, and the witnesses shall be examined in open court, or their depositions taken as in other cases, but no such petition shall be filed more than one year after the final judgment was rendered."

In Axtel v. Warden, 7 Neb., 186, it is held in the second branch of the syllabus:

"In such case, the law requires the moving party to show that he has exercised reasonable diligence to discover and produce such evidence at the trial; and his failure to do so, deprives him of all claim to a new trial."

Also the third branch of the syllabus:

"The petition is liable to demurrer, if it does not state facts sufficient to entitle him to a new trial, when they are admitted to be true."

And on page 189, the court say:

"Now in view of those general principles in regard to an application by motion for a new trial on the ground of newly discovered evidence, it seems very clear that when the application is made by petition, under section 318 of the civil code, the party must state in his petition facts, which, if admitted to be true, constitute sufficient grounds to grant a new trial; and the facts must be affirmatively stated, and not merely upon information.

"If any other rule were adopted it would open the door to endless applications for new trials."

The implication from that language is, that the facts averred in the petition must be of such character as, if admitted to be true by demurrer, they will entitle the party pleading, to a new trial. Now to that, it would seem to be necessary that these facts must appear: It must be apparent upon the face of the pleadings what the facts are; next, upon the substance of the petition, what the evidence addressed to these was; next, the newly-discovered evidence which the party, by the exercise of ordinary care and diligence, was unable to discover.

Those three facts would make up a sufficient case upon which the party might ask for a new trial. Then the court might say: This being the evidence, and this being newly discovered evidence, by applying the

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newly discovered evidence to the other already adduced, the court could determine whether a new trial ought to be granted.

The only averments of the petition here are averments of newly discovered evidence, without averments of evidence or statements produced at the former trial. But there is a conflict of authority on this question. I find that in Iowa the Supreme Court have taken precisely the opposite ground. The statute in Iowa, sec. 3116, of the revision of 1860, statutes of general nature of the state of Iowa, page 577, is precisely, in legal effect, our own statute, even to the very feature that the allegations of the petition shall be deemed denied, without answer. I find it unnecessary to read it, because it is in almost exactly the same phraseology as our own statute.

In Stineman, *Exr., etc., v. Beath*, 36 Iowa, 73, the Supreme Court has had occasion to give construction to that statute; and I read the first branch of the syllabus:

"New trial—Newly discovered evidence.—While a new trial will not be granted on the ground of newly discovered evidence, which is merely cumulative, it may be thought in some respects, the evidence is cumulative, if it in any degree has an independent and distinct bearing on the issue." (I read this by way of introduction.)

I now read the second branch of the syllabus:

"Contents of petition—Practice.—In an application for a new trial on this ground, the petition therefor need not set out the evidence introduced on the trial. It need only show the facts upon which the new trial is asked, the same as in other cases, and the issues thereon are to be tried as in ordinary proceedings."

So that case is distinctly to the effect that the evidence adduced at the former trial need not be set out. I am unable to find that statutes of similar purport have been passed upon elsewhere than in the states which I have named. The weight of opinion and authority would seem to be, taking the Indiana courts which, by three distinct adjudications, have given construction to this statute, together with the holding in the Supreme Court of Nebraska, supplemented and reinforced by the able opinion of Judge Okey—the weight of authority would seem to be that it is necessary to set up not only the issues but the evidence adduced at the former trial. And the better reason would seem to lie along that line because by reason of death or resignation of the judge who sat at the formal trial it would be impossible for another judge to determine the question unless the exact facts and evidence adduced at the former trial were set out. But I find it unnecessary in this case to pass finally upon that question or to give any opinion that shall be decisive in this respect because there is another consideration upon which this petition must be disposed of independently of the sufficiency of the allegations of the petition and that is, in the character of the newly discovered evidence. With respect now to the testimony of A. D. Leisy.

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It will be observed that the testimony referred to, is calculated to impeach or throw discredit upon his (Leisy's) testimony in the former trial. The question made in the former case was, whether a contract had been made between Briggs and Mrs. Rowley upon the terms of which he was to bid off that property for her. Mr. Leisy testified to such facts directly. In addition thereto, as a sort of reinforcement of his statement, he testified not only that such contract existed, but that he, in pursuance of that fact, had come up to bid upon that property but was prevented from so doing, by the agreement with Mr. Briggs. Observe the primary fact. Mr. Leisy's ability or lack of preparation to make a valid case is incidental to that main issue. Whether he was able to bid or unable to bid, would be immaterial if the contract was made.

Now it is averred in the petition, and it is now urged, that Mr. Leisy did not, in fact, have a thousand dollars which he got from the insurance company; that he did not, in fact, have drafts to the amount of \$1,800 or thereabouts; that he had not arranged with the bank to get the money and perfect his purchase by means of disposing of other property. All tending to show that Mr. Leisy did not state the facts in this case.

It is argued that Mr. Leisy, while he was present during a part of the hearing, did not take the witness stand; and it is urged that it is a sort of admission of the truth of the depositions that Mr. Leisy should appear in opencourt and that he should remain silent under a charge of having committed deliberate perjury.

Now newly discovered evidence, to warrant the granting of a motion for a new trial, according to Baylies on New Trials and Appeals, page 525, I read the heading on page 524, is :

" Motion for a new trial on the ground of newly discovered evidence.—To constitute a case for a new trial upon the ground of newly discovered evidence, it must appear that the evidence has been discovered since the trial and that the evidence is material to the issue, and goes to the merits of the case, and not merely to impeach a former witness."

Our Supreme Court in Reed, etc. v. McGrew, 5 Ohio St., 376, 387, in the opinion of Judge Hitchcock, say :

" Another reason urged for a new trial is the discovery of evidence, since the trial, material to the case. This newly discovered evidence is not evidence, the effect of which will be to prove new and distinct facts, but rather to prove facts by a new witness, which were testified to by other witnesses on the trial, and also to prove circumstances which will have a tendency to invalidate the testimony of one of the defendant's witnesses. This court will not grant a new trial to give a party the opportunity of introducing cumulative testimony merely, or to give him the opportunity of impeaching the witnesses of his adversary."

That may be said, however, to be a mere *dictum*.

In Carpenter v. Coe, 67 Barb., 411, the syllabus reads:

"Newly discovered evidence which goes to discredit a witness is not a ground for a new trial. Evidence which is only material or admissible to contradict the evidence of a witness, and to render him unworthy of confidence, is insufficient."

The same doctrine is held in 3 Johns., 255; 4 Johns., 425; 11 Barb., 216, and 42 Barb., 24, where in the last branch of the syllabus we read:

"Where the newly discovered evidence tends to impeach the character of a witness a new trial should not be granted."

The same is also held in 1 Lansing, page 71. And I find the general resume of holdings on this subject, in Amer. & Eng. Ency. Law, page 572:

"When the new evidence only tends to discredit or impeach an opposing witness, it will not avail as ground for a new trial."

As supporting the doctrine of the text a large number of cases are here cited, and the states are arranged alphabetically. I notice Ohio does not appear in the column; but there appears to be entire unanimity in New York, Georgia, Indiana, and especial reference is made to several cases, a sentence or two of which I shall read:

"Newly discovered evidence going merely to the credit of a witness, even of a sole witness, is not cause for a new trial."

Held in Hunt v. State, 81 Ga., 140: "Whether this rule would be departed from where the verdict was rendered upon the sole testimony of the adverse party: *Quaere*. It clearly ought not to be where such testimony, though the principal evidence in the case was supported by other evidence; nor where the party seeking the new trial had good reason to expect that the adverse party would be the principal witness in the case, and did not use reasonable diligence, to ascertain his reputation for veracity, and to be prepared to impeach him." Tappin v. Clark, 32 Conn., 367.

It results, I think, by a very singular unanimity of authority, that even if it be true that the averments of the petition are sufficient to constitute ground for granting a new trial, that if the character of the newly discovered evidence merely tends to impeach that of a witness upon a former trial, it is not, therefore, newly discovered evidence within the meaning of the term.

The contention of the defendant to this record is well taken, and, therefore, no new trial can be granted upon these allegations.

The next subject to which this petition is addressed is newly discovered evidence with regard to misconduct or alleged misconduct of the prevailing party and the jury.

Briggs testifies that he did not discover the facts which are made the basis of this allegation, until the month of November, 1889. They are, therefore, if established, newly discovered evidence in that sense.

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There is no certain means by which Mr. Briggs could have been put upon inquiry as to these facts. There was no certain means by which he could have became aware of these facts. And, therefore, I think that as to this subject-matter the objection that there was *laches* on the part of the defendant there and plaintiff here, in respect to this matter, is not tenable. The attempt to influence the conduct of the jury would naturally and necessarily be made under cover of secrecy. A person, acting from motives of that sort, would act secretly. And, therefore, facts of this character are not easily discoverable by those against whom such attempts have been made. And so, on the first question, I think it quite clear that it is not obnoxious to the objection that a lack of diligence has been shown.

I speak of that simply because if lack of diligence is apparent—lack of ordinary care—then, this ground could not be relied upon.

Mr. George Tuttle was a member of the jury. He swears that while in one of the corridors of the court house, while the case was on trial or the jury in actual deliberation (the meagerness of my notes not enabling me to say positively which, but I think it is immaterial), a woman who said she was a sister of the plaintiff in the former case, said, in his hearing, that she hoped the jury would favor her sister. This remark does not appear to have been addressed by the woman in question, directly to Mr. Tuttle. She was talking to a person not a juror. Mr. Tuttle swears distinctly that what he heard did not influence him in his verdict. He says, however, there were other jurors in the hallway.

Mr. George Eymer was also a juror. He says he saw a woman who said she was a sister of Mrs. Rowley; "while I was passing along, she said she hoped the jury would bring in a verdict for her sister as he had done her a great wrong—presumably Mr. Briggs had done her a great wrong. I walked right away. I saw her talking to other jurors, but I do not know what she said to them. I said nothing to her. She talked only once in my hearing. She was in the court-room during the trial—was around frequently." He says, on cross-examination, "I walked away as soon as I realized what she was doing. This had some weight, some influence, in my judgment. I returned the verdict on the law and the evidence. I knew what my duty was. I did not take much notice of her. After that, I gave her no further opportunity to speak to me; and that was in the middle of the trial."

Mrs. Rowley testifies that her sister, Kitty Bisbee, was not in the court-room during the trial at all.

Mrs. Minnie English testifies that she has known Kitty Bisbee for several years, and did not see her at any time during the trial. Mrs. Rowley, however, told the witness that Kitty was in the city.

Lenora Judd testifies that she knew Kitty Bisbee by sight; that she saw her between the Old Stone Church and the court house, or between

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the Lyceum Theater and the court house ; that she saw her at no other time or place during the trial. She says, " I was here two days."

Theresa Potter says that she knew Kitty Bisbee ; that she saw her between the Lyceum Theater and the stone church, talking with a juror whom she describes as seeing afterwards in the jury box.

Ella Briggs testifies she saw Kitty between the Lyceum Theater and the stone church talking to a man whom she did not know.

Kitty was not called. There is no denial on her part. Therefore, I think it results, and I find from the proof that Kitty Bisbee with the intention of influencing the verdict of the jury managed to address the jurors—two or three certainly, and, possibly, four in number. She is not called to deny the evidence, which plainly establishes in my judgment, those facts.

No knowledge of what she did is imputable to her sister, Mrs. Rowley. The only suggestion of any agency upon her part, is the fact of her relation to the plaintiff.

Now the question is, whether, under these circumstances, it is the duty of the court to award a new trial.

It will be observed that as to Tuttle and Eymer the facts are sworn to by the jury ; and, under the general theory of our law, jurors may be heard to support the verdict but not to impeach the verdict which they have rendered. That is the general rule, so announced in *Farrer v. State*, 2 Ohio St., 54, and so held by our Supreme Court wherever it had occasion to treat this subject, that it would be against public policy to allow jurors under solemnity of their oath, to render verdicts and then turn about and impeach their own verdicts.

So the question occurs to me, whether the court can, because of the existence of that rule, consider the testimony of these witnesses.

Thomson & Merriam, in their work on Juries, on page 439, sub-sec. 6, say :

"(6) Affidavits of jurors admissible to show.—The better to detect and punish an offense so dangerous to the upright administration of justice, the courts have made an exception to the general rule that the affidavits of jurors will not be received to impeach their verdicts ; so that such affidavits are freely received to show attempts at bribery, or other corrupt or undue influences."

Citing several cases in support of that doctrine. In *Farrer v. State*, *supra*, our Supreme Court say in the second branch of the syllabus :

"The holding of conversations by the jury, while in their room, with persons on the street, in regard to any subject of their deliberations, before their verdict is rendered, is, in general, good cause for setting aside their verdict."

On page 59, the court in commenting on the conduct of jurors, calls attention, first, to the general practice as embodied in sec. 5192-93 of our code :

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"If the jury are permitted to separate either during the trial, or after the case is submitted to them, they shall be admonished by the court, that it is their duty not to converse with, or suffer themselves to be addressed by any other person, on any subject of the trial, and that it is their duty not to form or express an opinion thereon, until the case is finally submitted.

"Such are the wise and liberal provisions of the new code as to civil cases.

"They are such as ought always to have been enforced. They depart from an ancient and useless severity, but they preserve the sense and substance of all that ought to be held sacred in the action of a jury. The record before us, shows a conduct very opposite to that required by such regulations; and, in a case of the least doubt, no verdict of a jury has or can have its usual and proper force and obligation with the court, if it appear, that the jury has exposed its privileges to abuse, or listened from its sanctuary to unsworn and irresponsible counsels.

"And these reflections may be the more readily and safely indulged, when we consider the alleged insufficiency of the evidence to maintain the verdict in this case. I cannot but regard the conclusion arrived at by the jury as sufficiently doubtful in itself, to enforce the necessity of considering such misbehavior on the part of the jury, as may possibly have led to such a result. Such an illustration will be proper in itself, and it will enable us the more speedily to reach the correct determination of the question before us. Where a court doubts the sufficiency of the evidence to uphold a verdict, it usually silences the doubt, by recognizing the right of the jury, freely, independently, and purely, to answer, out of his own unhindered and uncontrolled deliberations, every question of fact. But when it is apparent, that there has been either abuse by the jury of its rights and functions, or improper interference from without, it cannot be said that those questions have been answered as the law requires."

It occurred to me that there must be something akin to agency that it must be in some sense imputable to the plaintiff or connivance of plaintiff must be shown before a plaintiff in an action can be charged with the effects of misconduct on a part of a third person. It seems to me, and still seems, that the sufficiency or legality of the verdict should not be left at the mercy of some officious outside person; that such condition of things might so easily be brought about that a party might easily invoke the interference of outside parties, that it is against public policy to entertain the motion for a new trial upon this ground. That is the notion that I then had, and it remains to be seen how far the authorities uphold the contention that the interference of parties other than those interested, may operate to render a verdict void when the court is otherwise satisfied with the verdict. I have examined some

cases upon the subject and will cite them and then attempt to arrive at the true rule.

The first case I find, is in 41 Conn., 269; the last branch of the syllabus reads :

"Where a juror allowed such a conversation, in which it was stated to him that if the plaintiff should recover five thousand dollars damages he would have nothing left after paying his expenses, in which the juror expressed his concurrence, it was held after a verdict for the plaintiff, that the effect of the conversation was presumably to increase the damages allowed, and that the verdict ought to be set aside."

On page 278 of the opinion, the court say:

"In regard to the merits of the case, we think it is clear that the verdict should be set aside and a new trial had. It was an important question in the case what damages the plaintiff should recover. One of the jurors empaneled to try the case suffered a person, other than a juror, to say to him substantially, while the case was on trial, that if the trial should continue fifteen or twenty days, and the plaintiff should recover five thousand dollars damages, he would have nothing left after paying the expenses of the suit. The juror assented to the statement, and said substantially that he had learned from a party out of court during the trial what were the expenses of running the superior court, and expressed his opinion derived from information thus obtained that, the costs of the trial would amount to the sum of five thousand dollars; the same juror made on another occasion, to another party not a juror, during the progress of the trial, substantially the same statement, that if the plaintiff should recover five thousand dollars there would be nothing left after paying the expenses of the case. The same juror had other conversations with other parties not of the jury, and during the progress of the trial, and to one of them he narrated the substance of the evidence as far as it had been given. But there is no need of going further. The first two conversations respecting the damages necessary for the plaintiff to recover, in order to pay the expenses of the trial, we deem amply sufficient to set aside the verdict." And they did so in that case.

In 62 Me., 223, syllabus : "A verdict will be set aside if it be shown that the jury have been approached during the pendency of the cause and information volunteered upon the matters in issue therein, by a friend or relative of him in whose favor the verdict was rendered, although such improper influence was not exerted at the request, or with the knowledge of the party prevailing before the jury."

The court, in the opinion by Appleton, chief justice, say :

"The general principles applicable to interference by a party with jurymen while a cause is pending, are equally applicable to similar interference by the friends or relatives of the party in whose aid such interference is had. It was not necessary to show that the verdict was influenced by the improper conduct of the defendant's son. It is enough.

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that what was done by him was for the purpose and with the intention of influencing their verdict. Whenever a given course of conduct by the party litigant would induce a court to set aside a verdict, the like action on the part of his relatives and friends would be equally efficacious in producing the same result, for their interference would be more likely to influence the minds of the jury than the more obvious and apparent interest of the party in the trial of a cause, the appearance of evil should be as much avoided as evil itself. It is important that jurymen should be devoid of prejudice. It is hardly less so, that they should be free from the suspicion of prejudice."

In the same volume, page 202, the same doctrine is announced practically.

Also in 8 Phila., 30; and the same doctrine in 40 Vt., 363, McDaniels Exr., etc. v. McDaniels, first branch of the syllabus:

"Conversations had with jurors about the case on trial by the friends of the prevailing party, intended and calculated to influence the verdict, constitute a sufficient cause to warrant the court in granting a new trial, even though not shown to have influenced the verdict in point of fact, and though they were had without the procurement or knowledge of the prevailing party, and listened to by the jurors without understanding that they were guilty of misconduct in so doing."

In the opinion, on page 374, Steele J., is this language:

"The motion for a new trial was properly granted. It was not incumbent upon the moving party to show that the verdict was, in point of fact, influenced by the unlawful conversations. It is quite enough that, in a doubtful case, conversations with the jurors have been had during the progress of the trial for the purpose of influencing and directly calculated to influence them to render just the verdict they did."

In 38 Conn., 115, the first branch of the syllabus is as follows:

"A verdict will be set aside where a juror converses with a third person during the trial concerning the case, especially if such conversation shows a bias against the unsuccessful party unless it appear that the successful party received no benefit, and his opponent no injury, from the misconduct of the juror."

The same doctrine is announced in: 68 N. C., 200; 44 Ga., 200; 29 Ind., 595; 2 Ill., 485; and in Thompson & Merriam on Juries, page 406, under the head of "improper communications between jurors and third persons," the subject under discussion by this text writer:

"(2.) Unexplained communication.—But, as an unexplained separation of jurors from their fellows leads to an inference of tampering, so the fact that jurors have held communications with the successful party to the suit, with his friends, counsel or agents, the nature of which is not disclosed, will lead to such an inference of tampering as will require the verdict to be set aside."

On page 489, paragraph 7: "(7.) Communications by friends of the prevailing party.—So sensitive is the law upon this subject, that if, during the progress of the trial, friends of the prevailing party have had conversations with members of the jury, or have made declarations in their hearing, with the apparent purpose of influencing the verdict in his favor, the direct tendency of which was so to influence it, the verdict will not be allowed to stand; and this is so, although it might not appear in point of fact that the verdict was influenced by the unlawful conversations, and although they were had with the jurors without the knowledge or authorization of the prevailing party."

On page 441, paragraph 10: "(10.) By officious third persons.—In like manner a verdict will be set aside in a civil case, if it be made to appear that, during the trial of the case, a third person, in the interest of the successful party, approached a juror and made statements to him prejudicial to the character of the unsuccessful party for morality and integrity; especially, if the successful party must, knowing that such third person had made such statements, handed to the juror a pamphlet having a tendency to confirm his mind in the belief of their truth," etc.

And also on page 442, paragraph 12, under heading, "Rule where the communication is disclosed."

Bailey in his work on New Trials, page 539, lays down the same general principles.

It occurred to me during the hearing upon the petition, that, unless some evidence be presented sufficient to establish at least an agency, that unless the plaintiff, in that case, was some way chargeable with the fact of the interference,—that, because of the peculiar character of our statute, making two substantial grounds of misconduct of the jury in the one instance, and misconduct of the prevailing party, that, giving it natural construction, it could not be held that the officious interference of a third person, even though a relative of the party in favor of whom the verdict was rendered, could operate to defeat the verdict.

It should be remembered, however, that all the provisions of the code are to be given liberal construction with a view to the proper administration of justice. No mere irregularity in the course of a trial shall operate to defeat a verdict if the court is otherwise satisfied with it. The question comes: Did this misconduct of Kitty Bisbee have any effect upon the jury? Mr. Tuttle says it did not affect him. Mr. Eymer says it did affect him. As to the other two jurors whose names are not disclosed, the court is unable to entertain any opinion as to whether or not it did affect them.

The court had admonished Mr. Tuttle and Mr. Eymer that they should not speak to any one, or suffer themselves to be addressed during the trial, by any person. While not a violation of the letter, perhaps, of that admonition, yet certainly it was a violation of its spirit, to listen to a communication though not addressed to themselves. If it had

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been merely an expression of hope that the jury would do a certain thing—"that they will bring in a verdict for my sister"—it might be regarded, as a trifle; but to say, "I hope that the jury will bring in a verdict for my sister because he has done her a great wrong," is different. The juror knows nothing about the merits of the controversy except what he has heard, and to hear the expression "he has done her a great wrong," naturally makes him wonder how—why, in the course of this transaction. Much comes out. He has heard a mass of things, like Cassio. He has no distinct recollection of precisely what he has heard.

Juries as a class are unable to analyze the mental processes by which they arrive at their verdicts,—they are largely matters of intuition, and jurors are not required in their verdict, to set out the grounds upon which they are based. But while this is an infirmity in the system of trial by jury, yet it is also the source of its strength, because instead of arriving at their final results by the labored processes of logic and inference, they go straight to the final results with the certainty of instinct. So that I say, this fact is at once the source of the strength and weakness of trial by jury.

After a juryman has heard, during the course of a trial, some things in the court-room and other things out of the court-room, bearing upon the merits of the case on trial, it would be utterly impossible, in my judgment, for him to distinguish after the lapse of a day or two between such things that were heard in the court-room and those things that were heard outside of the court-room. So that, it is the theory and the policy of the law, that jurors should be very jealously guarded from any least suggestion or intrusion from the outside; and the policy of the law, here and elsewhere, in this respect, is clearly defined and abundantly attested by numerous adjudications of courts of last resort.

There is one practical embarrassment connected with this case, and it is this: the misconduct charged and established by the proof, cannot directly be said to be the misconduct of the plaintiff in the former case, but it certainly resulted to her advantage, and it may have been influential in shaping the verdict. And I am disposed to hold that it would be contrary to public policy to let this verdict stand in view of the facts, although the misconduct complained of is not directly imputable to the plaintiff in the former trial; but, whether imputable to the plaintiff or not, public policy requires that the jury, while serving in a case, shall be absolutely free from suspicion and shall be uninfluenced by anything outside of the evidence adduced in the trial of the case. There is a sense in which the mere fact of listening to conversation of Kitty Bisbee on the part of the jurors, may be called misconduct. They had been admonished that they should not suffer themselves to be addressed. To listen to the conversation of an interested party addressed

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to some third person, would not be a literal violation of the injunction, but would certainly violate its spirit and purpose.

I am convinced that, under the circumstances as disclosed by the proof in this hearing, it is my duty to grant a new trial which will, therefore, be done.

Wilcox & Friend, counsel for plaintiff.

Dickey, Brewer & McGowan, counsel for defendant.

TITLES—BOUNDARY LINES—RIVERS.

[Montgomery Common Pleas, May 26, 1900.]

DAYTON (CITY) v. COOPER HYDRAULIC CO. ET AL.

1. POSSESSION—EXERCISING ACTS OF OWNERSHIP.

Exercising acts of ownership over unimproved land, such as hauling gravel, sand and dirt therefrom, sinking wells and making streets on the same, shows sufficient possession on the part of one claiming to be the owner in fee of the land to maintain an action to quiet title thereto under sec. 5779, Rev. Stat.

2. ESTABLISHING TITLE BY POSSESSION.

In order to claim title by prescription, the use must be adverse, uninterrupted, continuous, and with the knowledge of the owner of the estate for a period of twenty-one years.

3. WATERWORKS TRUSTEES—ESTOPPEL.

In cities of the second grade of the second class, the board of waterworks trustees is the creature of council, and no act done by such trustees can create an estoppel against the city (Dayton), under any claim the city may make as to the title of real estate.

4. BED OF AN UNNAVIGABLE RIVER.

Where the call in a deed is, "in and to the ground constituting the bed of said river," (the same being an unnavigable stream) the bed of said river is the hollow basin through which the water of the river flows at low water mark.

5. BOUNDARY LINES ALONG THE BANK.

When the call in a deed is, "thence southwestwardly along the meanderings of the south bank of Mad river," such description carries the northern boundary line to the south bank of Mad river, "at low water mark," when the water in the river is at its average and ordinary stage, during the entire year, without reference to the extraordinary freshets of the winter and spring or the extreme droughts of the summer or autumn.

KUMLER, J.

The petition in this case was filed on January 4, 1897, and plaintiff avers in substance that it is a municipal corporation of the second grade, of the second class, under the laws of the state of Ohio, and that the defendants are both corporations under the laws of the state of Ohio, and doing business in this city.

It alleges that it is the owner in fee simple and in actual possession and occupancy of the following premises:

Beginning at the west abutment of the bridge across the basin extension canal on Water street; thence northwardly with courses and distances to the abutment of the Mad river aqueduct; thence southwestwardly along the meanderings of the south bank of Mad river and along

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the south bank of the Great Miami river to the east line of Mill street; thence south along the east line of Mill street to the north line of Water street; thence eastwardly along Water street to the place of beginning.

Plaintiff avers that its title to said land is derived under and by virtue of a deed of general warranty from Harrison Smith and James Bayard, trustees of Letitia C. Backus, dated February 20, 1872, to said city, and duly delivered by said grantors to said city, conveying said land to said city in fee simple, for good and valuable considerations therein named.

It avers that said defendants claim some interest in said land, adverse and hostile to plaintiff, in this, to-wit: That said The Cooper Hydraulic Company, claims to be the owner of the land above described under a deed from the trustees of said Letitia C. Backus, dated February 18, 1870, for the ground constituting the bed of Mad river within said county.

It avers that said defendants, nor either of them, have any title, interest or valid claim in or to said premises, or any part thereof, and that the claim they make is unfounded and is a cloud upon the plaintiff's title.

The prayer is that its title may be quieted to said land, and defendants be forever barred from having or claiming any right in or to said premises, or any part thereof.

To this petition the defendant filed an amended answer on February 3, 1898, admitting the execution and delivery of the deed from the trustees of Letitia C. Backus to the city of Dayton on February 20, 1872, and avers that the description contained in the petition of plaintiff describes and embraces the land upon which was the levee as it was then built, extending from the corner of Monument avenue and Mill street northeastwardly to the aqueduct over Mad river in the eastern edge of the city, and did not cover the lands between the north base line of said levee as then built and low water mark of Mad river. It denies that the plaintiff has any title to or interest in, or in possession of the lands, title to which is sought to be quieted in this action.

It further avers, as a second defense, that the defendant, The Cooper Hydraulic Company, and those under whom it claims have, for more than twenty-one years next before and preceding the bringing of this action, been the owners of said premises, continuously, and in open and notorious possession of the same, and the said plaintiff has no interest in or title to said premises.

On April 12, 1900, the Cooper Hydraulic Company filed an amendment to the answer, averring that pursuant to a contract, and lease made by the Cooper Hydraulic Company to the board of trustees of waterworks of the city of Dayton, dated the thirtieth day of March, 1889, the city of Dayton entered upon the land north of the levee along Mad river belonging to this defendant, from the Webster street bridge

eastward to the aqueduct of the Miami and Erie canal, under an annual rental, and have so continued to the present time, paying the rental required by said contract, and continuing said contract from year to year up to the present time, and that the said plaintiff is thereby estopped from claiming title to or possession of the above property other than as tenant under this defendant.

On February 8, 1898, the city of Dayton filed a reply to the amended answer of the Cooper Hydraulic Company, denying that the land described in the petition embraced only the land upon which the levee was built on February 20, 1872, extending from the corner of Monument avenue and Mill street northeastwardly to the aqueduct over Mad river in the eastern edge of the city, and avers that the description of land set forth in the petition describes all of the land covered by the base of said levee, and of all the land lying between said levee and low water mark of both Mad river and of the Great Miami river.

The reply further denies that said defendant, and those under whom it claims or either of them, have for more than twenty-one years next preceding the bringing of this action, or for any length of time at all, been the owners of said premises continuously or otherwise, and been in open or notorious possession of same.

On May 14, 1900, the city filed a reply to the amendment to the answer, denying that said city ever entered upon the land lying between the south low water mark of Mad river and the north base of the levee on the south side of Mad river, under any contract or lease with said Hydraulic company, and denying that it is estopped from claiming title and possession of the land between said levee and Mad river, by virtue of a certain lease between the waterworks trustees of the city of Dayton and the Cooper Hydraulic Company, executed on March 30, 1899.

It avers that William Huffman was a member of the board of waterworks trustees of said city from 1887 to 1890, and that in 1890 he was appointed a member of the board of city commissioners of said city, and continued as such commissioner until about the middle of April, 1892, and that said Huffman was during all of the time above mentioned a stockholder in and general manager of the Cooper Hydraulic Company.

On May 14, 1900, the city filed a motion, asking the court to strike out the second paragraph of the amendment to answer filed herein, for the reason that the matters pleaded therein are evidence, and not facts.

Upon an examination of the paragraph referred to, we are of the opinion that it does not plead evidence, and the motion, therefore, to strike out is overruled.

The case came on for hearing on the pleadings and the evidence and arguments of counsel.

We will first dispose of the questions of possession of plaintiff to the land controversy, the claim of adverse possession of the Cooper

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Hydraulic Company for more than twenty-one years prior to the bringing of the suit, and to the defense of estoppel, for if either of these defenses have been made out by the evidence in the case, that is the end of the controversy, and no attention need be given to the main issue in the case. These in their order :

Possession of plaintiff.—This action is founded on sec. 5779, Rev. Stat., and so much thereof as is applicable in this case reads as follows:

"An action may be brought by a person in possession by himself or tenant, of real property, against any person who claims an estate or interest therein in adverse to him for the purpose of determining such adverse estate or interest."

The evidence in the case shows that all of the street commissioners and superintendents of streets, from Henry Guckles in 1875, to D. C. Estabrook in 1900, have entered upon this land by order of the city council, the board of city affairs and of the city civil engineers, and exercised acts of ownership over the land in controversy, such as hauling out gravel and earth for the city, making roadways into the land, dumping on said land refuse matter, building the Idylwild drive, extending almost wholly on this land, from Mill street to Webster street, some sixty feet in width, which street has been lighted, graveled and cared for by the city, and by leasing a portion of said land to the Gas Company, who has ever since June 28, 1890, paid the rental under said lease to the city.

We are of the opinion, therefore, that the city has been in possession of the land in controversy since February 20, 1872, although the Cooper Hydraulic Company have on different occasions exercised acts of ownership over the land. In fact, the testimony shows that both parties have claimed possession and exercised acts of ownership over this land, the city since 1875, and the Hydraulic Company since 1887; there is no evidence in the case showing that the Hydraulic Company ever exercised any acts of ownership over this land or ever made any claim to the same until August, 1887, when the Hydraulic Company presented its lease to the waterworks trustees for a part of the same, although the city exercised acts of ownership over this land from 1875, such as taking gravel, earth, etc., from the same, which must have been done with the knowledge of the Hydraulic Company.

If the evidence and the law governing this case will warrant a decree in favor of the plaintiff as to title to the land under this deed, sufficient possession has been shown to entitle the plaintiff to maintain this action.

Adverse possession.—The defendant, The Cooper Hydraulic Company, claims that under its deed it has occupied all this ground to the foot of the levee from low water mark, adversely to the city for more than twenty-one years and therefore it is entitled to said land by adverse

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possession for more than twenty-one years. What is adverse possession?

Where the right claimed is by prescription, it must appear that the use is adverse, uninterrupted, continuous, and with the knowledge of the owner of the estate, and in this state such use must have existed and continued for at least the period of twenty-one years." Young v. Spangler, 1 Circ. Dec., 638; Paine v. Skinner, 8 Ohio, 159; Cincinnati v. Evans, 5 Ohio St., 594.

The testimony shows beyond any question that the use of the land by the Cooper Hydraulic Company was neither uninterrupted nor continuous. The records of the city council show that on February 26, 1876, a resolution was passed by the city council that the committee on levees be instructed to have the superfluous earth which was placed on the levee between the Mad river railroad bridge and Main street bridge thrown down, and the top of said levee leveled.

On August 27, 1887, the Cooper Hydraulic Company presented to the board of waterworks trustees a lease of their property in the bed of Mad river where new wells were being sunk by the waterworks trustees, which was read and referred to the city solicitor for investigation of the title of the Cooper Hydraulic Company to the land in controversy.

On February 8, 1888, a communication was received by council from the waterworks board, asking it to approve and order executed a lease which was attached, which was supposed to cover the land upon which the waterworks wells were situated. This communication was referred to the committee on law, which on May 11, 1888, reported to council that the land covered by the lease, which is the identical land in controversy, was owned by the city, and recommending that the lease be not approved, and the report was not adopted.

On November 5, 1887, the city solicitor, Colonel D. B. Corwin, presented to the board of waterworks trustees his written opinion relative to the title of the land contained in the lease, which is the same land described in the petition holding that the deed from Baçkus' trustees to the city of Dayton, February 20, 1872, conveyed to the city all the land lying north of the levee, at least to low water mark of Mad river.

And on January 21, 1888, Mr. McMahon gave a like opinion to the board of waterworks trustees.

At the time these opinions were given the city had sunk twenty-five wells on the land in controversy. They now have sunk eighty-seven in all.

These facts, in connection with those referred to above under the discussion of "Possession of plaintiff," show conclusively that the adverse possession claimed by the Cooper Hydraulic Company was neither uninterrupted nor continuous, and, therefore, the company cannot claim title to this land by prescription.

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Estoppel.—The Cooper Hydraulic Company claims in its first defense, in its amendment to the answer, that the city of Dayton is estopped from claiming this land, and avers that pursuant to a contract and lease made by the Cooper Hydraulic Company to the board of waterworks trustees of the city of Dayton, dated the thirtieth day of March, 1889, the city entered upon the land north of the levee along Mad river, belonging to this defendant, from the Webster street bridge eastward to the aqueduct of the Miami and Erie canal, under an annual rental, and have so continued to the present time paying the rental required by said contract, and continuing said contract from year to year, up to the present time, and that the said plaintiff is thereby estopped from claiming title to or possession of the above property other than as tenant under this defendant.

On the contrary, the city claims that it cannot be estopped by any act of the board of waterworks trustees, especially as to the title of land as the power to purchase and lease land for waterworks purposes is vested exclusively in the city council.

Section 2407, Rev. Stat., provides: "The council of a city or village shall have power to take possession of any land obtained for the construction or extension of waterworks, reservoirs, or the laying down of pipe, and also any water rights or easements connected with the use of water; and any land, water right, or easement so taken possession of for waterworks purposes shall not be used for any other purpose, except by authority of the trustees and consent of the council."

Section 2413, Rev. Stat., provides that, "The trustees or board shall make monthly reports to the council of the receipts and disbursements of money belonging to the waterworks. * * * *

Section 2415, Rev. Stat., provides that, "The trustees shall be authorized to make contracts for the building of machinery, waterworks, buildings, reservoirs, and the enlargement and repair thereof, and the manufacture and laying down of pipe, and the furnishing and supplying with connections all necessary fire hydrants for fire department purposes and keeping the same in repair, and for all other necessary purposes to the full and efficient management and construction of waterworks."

Section 1692, Rev. Stat., provides that, "In addition to the powers specifically granted in this title, and subject to the exceptions and limitations in other parts of it, cities and villages shall have the general powers enumerated in this section, and the council may provide by ordinance for the exercise and enforcement of the same."

Subdivision 34 provides that, "Council shall have the power to acquire by purchase, or otherwise, and to hold real estate, or any interest therein, and other property for the use of the corporation, and to sell or lease the same."

The board of waterworks trustees is a creature of council, and its powers are limited by the statute. We have examined the statutes very

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carefully, and nowhere is it provided that the board of waterworks trustees have the power either to purchase or lease real estate.

Without passing upon the question, it seems to me that the lease entered into, between the Hydraulic Company and the board of waterworks trustees is void for want of authority upon the part of the waterworks trustees to lease the same.

At any rate, we are of the opinion that the city is not estopped from claiming the land in controversy by reason of the lease referred to. No act done upon the part of the waterworks trustees can create an estoppel against the city, especially an estoppel against the city under any claim that it may make as to the title to real estate.

Construction of deeds.—We now come to the main issue in the case, namely to whom does this land belong, lying between the levee on the south side of Mad river to low water mark on the south side of the river, extending from Mill street to the aqueduct. In order to determine this question, we must rely in the main upon the language of the respective deeds, and the construction placed upon similar descriptions where lands have been conveyed bounding and abutting on unnavigable rivers, creeks and streams, by courts of the last resort, including our own Supreme Court.

The deeds were both executed by Letitia C. Backus. The deed to the Cooper Hydraulic Company was executed and delivered on February 18, 1872, and conveyed to the Hydraulic Company "All the right, title, interest and property, either in law or equity, of said party of the first part, in and to the water and uses thereof flowing through Mad river within said county of Montgomery, in said state of Ohio, as well as all their right, title, interest and property, either in law or equity, *in and to the ground constituting the bed of said river within said county.*"

The deed to the city of Dayton was executed and delivered on February 20, 1872. Said deed contained the following description: "Beginning at the west abutment of the bridge across the basin extension canal on Water street, and running thence northwardly, giving courses and distances, to the abutment of the Mad river aqueduct, which line is the inside or south base of the levee."

After the call to the Mad river aqueduct, the description proceeds as follows: "*Thence southwestwardly along the meanderings of the south bank of Mad river and along the south bank of the Great Miami river to the east lines of Mill street; thence south fourteen degrees, fifteen minutes, east along the east line of Mill street to the north line of Water street, and eastwardly along Water street to the place of beginning.*"

The Cooper Hydraulic Company claims that under its deed it owns the bed of the river up to the base of the levee on the south side of Mad river. The city of Dayton claims that under the deed to the Hydraulic Company its south boundary line is low water mark on the south side of

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Mad river. And the city further claims that under its deed its northern boundary line is low water mark in Mad river.

The question, then, for the court to determine is, what is the bed of Mad river, within the meaning of the deed to the Hydraulic Company?

The determination of this question has been a source of controversy between the Hydraulic Company and the city ever since August, 1877, when the Hydraulic Company presented a lease to the waterworks trustees of their property in the bed of Mad river, where new wells were being sunk.

This lease was referred to Colonel D. B. Corwin, then the city solicitor of Dayton, to report on the title of the land described in the lease. On November 5, 1887, Colonel Corwin made his report to the board of waterworks trustees, as follows:

To the Board of Waterworks Trustees:

"GENTLEMEN—In regard to the proposed lease from the Cooper Hydraulic Company to the city of Dayton, of land on which your wells are located, which proposed lease you referred to me for examination of title, I have this to say: I find that five of your wells are located north of the stream of Mad river, nearly north of your pumphouse, and 25 feet south of that stream. By a deed dated February 20, 1872, Letitia C. Backus' trustees conveyed to the city of Dayton the lands on each side of the levee, extending from Mill street to the aqueduct. The northern line of that ground extending from the aqueduct southwestwardly, is described in the deed as follows: Thence southwestwardly, along the meanderings of the south bank of Mad river and along the south bank of the Great Miami river to the east line of Mill street. This deed, in my opinion, conveys to the city all the land lying north of the levee, at least to low water mark of Mad river. There is some conflict of authorities as to whether such a description includes the land to the middle of the river or only to low water mark. 2 Washburn on Real Property, 676; Lamb v. Rickets, 11 Ohio, 311. But there can be no doubt that in Ohio the land to the low water mark is included. This disposes of the question as to the land lying south of the low water mark of Mad river, on which twenty-five of your wells are located, that said land already belongs to the city. As to the land north of the river, on which you have some five wells, I am unable, without assistance of your engineer, to determine who has the title. But the interest of the Cooper Hydraulic Company in the same is so vague and uncertain, that I should not advise you to take a lease from them until their title, if they have any, shall have been adjudged by a court of law to be good.

"Very respectfully,

"D. B. CORWIN,
"City Solicitor."

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On November 19, 1887, the above opinion of Colonel Corwin was referred to the Hon. John A. McMahon for examination and report on the title. He reported on January 21, 1888, as follows:

"In regard to the title of the Cooper Hydraulic Company to the ground in which most of the recent water wells of the city of Dayton have been dug, I have this to report: The deed to the Cooper Hydraulic Company is prior in date to the deed to the city. February 18, 1870, the trustees of Letitia C. Backus and others conveyed to it the '*ground constituting the bed of Mad river*', such conveyance being made in connection with certain valuable water privileges also granted at the same time in the same deed. The deed to the city of Dayton of February 20, 1872, by the same parties conveys a strip of ground, of which the northern boundary only is important in this connection. This northern boundary is as follows: From the abutment of the Mad river aqueduct '*along the meanderings of the south bank of Mad river, etc., to the east line of Mill street*.' As the deed to the Cooper Hydraulic Company is prior in time, its effect is to be considered; as the city could not buy what has been already sold and *conveyed* to some other person. We must therefore determine what passes to a purchaser under the description of '*the ground constituting the bed of Mad river*'. If the deed to the city had been *prior in time*, and its northern boundary had been *Mad river*, the city would have owned to the center of the river. June v. Purcell, 36 Ohio St., 896; Day v. Railroad Co., 44 Ohio St., 406.

"If the deed to the city had been *prior in time* and the northern boundary line stands as it does in the deed, to-wit: The bank and along the bank of Mad river, etc., there is no question that the right of the city would have extended to low water mark along Mad river, etc. McCullough v. Aten., 2 Ohio, 807; Lamb v. Rickets, 11 Ohio, 312.

"Such being the law, I am inclined to think that a conveyance of the bed of a river would stop at low water mark, the beginning, in law, though not always in fact, of banks. And I think that the conveyance to the Cooper Hydraulic Company should stop at low water mark.

"I have considered the case of Howard v. Ingersole, 54 U. S., (18 How.) 415, in which was involved the boundary line between Georgia and Alabama, wherein the court adopts an intermediate line between high water mark and low water mark, one to be ascertained by the judge or jury in each case where the action of the water has permanently marked itself upon the soil or the ordinary and permanent bed of the river.

"But as our Supreme Court has defined this ordinary and permanent bed of the river to be at low water mark, I feel bound to say that the 'bed of the river' would be held to terminate at such point, unless some changes should take place in judicial holding, in our Supreme Court.

"In the latter case between Georgia and Alabama the Supreme Court of the United States defines the 'bed of the river' to be that 'portion of its soil which is alternately covered and left bare as there may be an

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increase or diminution in the supply of water, and which is adequate to contain it at its average and mean stage during the entire year without reference to the extraordinary freshets of the winter and spring, or the extreme droughts of the summer or autumn.' State of Alabama v. Georgia, 64 U. S. (23 How.) 515.

"This is a more natural and proper interpretation of the words, and one which I would be inclined to adopt, if our Supreme Court had not settled that a call for the banks of a river carry the title to low water mark. If the banks extend to low water mark, the bed of the river must stop at the same point. The intervening ground between low water mark and the bank is sometimes called the 'shore.'

"II. A second question now arises to be settled. I understand that some of the wells are sunk in what *was* below low-water mark in 1870 and 1872, and indeed since then; but that they are *now above* low water mark. In other words the ground that constituted the bed of Mad river in 1870 does not constitute it now. The rule in Ohio is as follows:

"Where the bank is gradually and imperceptibly increased by the deposit of soil, gravel, etc., so that the bed of the river is changed by degrees and slowly, the owner of the land on the bank continues to own to low water mark, although the line of low water is changed. Lamb v. Rickets, 11 Ohio, 310; Niehaus v. Shepherd, 26 Ohio St., 44.

"Applied to additions to the New Orleans levee. New Orleans v. United States. 10 Peters, (U. S.), 717.

"And if Mad river has been slowly and gradually changing its bed toward the north, and carrying away the soil upon that side, the ground owned by the Cooper Hydraulic Company under its deed for the bed of the river, is the bed of Mad river *as it now exists*, being that part of the river which is now contained in the present river between low water marks on either side.

"To determine the right of the city you will therefore ascertain what is *now* the bed of Mad river, by defining the low water mark on both sides. What is between these lines, fixing low water mark, is the bed of the river—if the changes have been gradual, steady, and not violent. This rule will be of some importance to the Cooper Hydraulic Company, for its main object in procuring the ownership of the *bed* of the river was to use the same in connection with the control of the water therein for water privileges, and if its ownership of the land did not shift with the stream some embarrassment might arise.

"I have given the above matter a great deal of careful consideration, with a view to a proper decision of the questions involved. I cannot say that I am *sure* that the opinion is correct, but I feel some confidence that the courts will decide as I have indicated.

"Respectfully submitted,

"JOHN A. McMAHON."

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To the Trustees of Waterworks, Dayton, Ohio:

Thus it will be seen that Colonel Corwin and Mr. McMahon were both of the opinion that the title to the property in dispute was vested in the city of Dayton.

Now, as to the call in the deed to the city; what have the courts to say about this and similar descriptions?

In *Lessee of McCullough v. Aten*, 2 Ohio, 807, the syllabus is: "When a deed calls for a corner standing on the bank of a creek 'thence down said creek, with the several meanders thereof,' the boundary is the water edge at the low water mark."

In the opinion the court say: "The single question to be decided in this case is, what boundary is described by the term 'down the creek with the several meanders thereof?' and we think it perfectly clear that these terms describe the water in the bed of the creek, and not the top of the bank. This we understand to be a settled rule, where the stream is made the boundary. It is the water, and not the bank of its channel that is referred to. The state is bounded by the Ohio river; but it can scarcely be supposed that the beach below the break of the bank is not within her jurisdiction. In *Hadley's Lessee v. Anthony*, 18 U. S. (5 Wheat.), 374, this doctrine is distinctly recognized by the Supreme Court of the United States as being a rule of boundary. And it is one to which this court has always adhered." "The fact that the marked corner called for stands four rods from the water, does not create any ambiguity in the term 'down the creek with the several meanders thereof.' They import the water's edge, at low water, which is a decided natural boundary, and must control a call for corner trees, or stakes upon the banks."

In *Lamb v. Rickets*, 11 Ohio, 311, the syllabus is as follows:

"Where a deed calls for an object on the bank of a stream, thence south, thence east, thence north to the bank of the stream, and with the course of the bank to the place of beginning, the stream, at low water mark, is the boundary.

"Where the owner of land is bounded by a stream, he owns to the center of the stream, subject to the easement of navigation, etc., but to calculate the quantity in a survey, no reference is had to what lies between low water mark and the center of the stream."

In the opinion, Wood, J., speaking for the court says:

"The deed of Moore and wife to Joseph Rickets is the oldest deed, and the one on which both of the parties rely, and it describes the tract by metes and bounds as follows: 'Beginning on the south bank of the Tuscarawas river, where the line between the first and second quarters of said Fifth township intersects the same, etc., thence south, with the division line of the first and second quarters, etc.; thence east, etc.; thence north, etc., to the south bank of the Tuscarawas river, from which a maple, four inches in diameter, bears south, etc.; thence with the courses of the south bank of the Tuscarawas to the beginning.'

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"As counsel suggest in argument, it commences with the bank, returns to the bank, and thence with the course of the bank to the beginning. Not from, to, or with the bank, as it was twenty-five or thirty years ago, but as it was when the Hamlin tract was conveyed to the complainant; to the bank, with it, and from it, as the lines of the survey must now be extended, so as to include the alluvion to law water mark."

"We need not, however, elaborate this principle. It has been done by those who have gone before us, and, as we think, the rule, as there laid down, ought to be adhered to." Citing *Lessee of McCullough v. Aten, supra.*

In *Lembeck v. Nye*, 47 Ohio St., 836, the syllabus of the case is as follows:

"2. (a) Where one who owns a tract of land that surrounds and underlies an unnavigable lake, the length of which is distinguishable greater than its breadth, conveys a parcel thereof that borders on the lake, by a description which makes the lake one of its boundaries, the presumption is that the parties do not intend that the grantor should retain the title to the land between the edge of the water and center of the lake, and the title of the purchaser, therefore, will extend to the center thereof.

"(b) If, however, the call in the description be to and thence along the *margin* of the lake, no such presumption arises, and the title of the purchaser will extend to *low water mark only.*"

In this case the description was "to and thence along the *margin* of the lake," and the court interprets the words "*margin of the lake*" to mean the line where the earth and water meet around the lake, and the case follows and approves, *Lessee of McCullough v. Aten and Lamb v. Rickets, supra.*

In *Halsey v. McCormick*, 13 N. Y. App., 296, the syllabus reads as follows:

"Where in a deed the land is described as extending to *the bank of a creek*, the grantee does not take title to its center; nor is he limited to the bank at high water mark. Such a description includes the land to the margin of the stream at *low water*. The rule which prevails as to grants bounded on the shore or bank of the sea or navigable rivers, is not applicable to streams not navigable."

The description in this conveyance was as follows: "A lot of land fronting the south side of the turnpike road running easterly by Bennett's mills, and joining the east line of lands belonging to the heirs of Richard W. Pelton, deceased, being five rods east and west in width and running south from said road to *the bank of the six mile creek*," the plaintiff, on the trial, claimed that his deed conveyed the land to the center of the creek, but the judge charged that the bank of the creek was the boundary, and the plaintiff excepted.

There was a controversy as to where the bank of the creek was, and the judge charged "It was that line to which the water would flow

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when it was ordinary high water in spring and fall." To this the plaintiff excepted.

Denio, J., in delivering the opinion of the court, says:

"Did the deed carry the plaintiff to the center of the creek or only to the bank? This question is well settled against the plaintiff by several adjudged cases. The plaintiff's land is bounded by the bank of the creek and does not extend any further. I am of the opinion that the deed carried the plaintiff to low instead of high water mark. It would be unreasonable to intend that by the description in that conveyance the parties contemplated that there should be a strip of land between the plaintiff's southern boundary and the water. If we adopt the ruling at the trial, the plaintiff, who may be presumed to have purchased with a view to such use of the stream as might ordinarily be had by the owner of the land on one side of it, would be excluded from all use of the water except during the spring and fall months; and thus when he would be most likely to need it for the purpose of watering his cattle, or the like, he would be deprived from all benefit from its use.

"So far as I can find any authority on the question, it is in accordance with the views which I entertain. The contrary rule laid down on the trial of this cause would lead to such inconvenience, not to say absurd consequences, that I feel quite satisfied that it ought not to be sustained; I am, therefore in favor of reversing this judgment for the misdirection in this respect. Judgment accordingly."

In Child v. Starr, 4 Hill, 369, the syllabus in the case is as follows:

"Where, in the conveyance of a lot situated in the city of Rochester, it was described as a mill lot, beginning, etc., and running 'eastwardly to the Genesee river; thence northwardly *along the shore of said river t, Buffalo street, etc.*, Held: that no part of the bed of the river passed under the conveyance, but that the grantee took only to low water mark." * * * If the *bank shore or margin* of the river be designated as the boundary, or the line be described as running *along the bank*, etc., the grantee takes to low water mark."

The opinion of the court was delivered by Walworth, Chancellor, who says:

"Running to a monument standing on the bank and from thence running by the river or along the river, etc., does not restrict the grant to the bank of the stream; for the monuments in such cases are only referred to as giving the directions of the lines to the river, and not as restricting the boundary on the river. If the grantor, however, after giving the line to the river, bounds his land by the bank of the river, or describes the line as running along the bank of the river, or bounds it upon the margin of the river, he shows that he does consider the whole alveus of the stream a mere mathematical line, so as to carry his grant to the middle of the river, and it appears to me equally clear that the grant is restricted where it is bounded by the shore of the river, as in

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the present case. The shore of tide water is that portion of the land which is alternately covered by water left bare by the flux and reflux of the tide. Properly speaking, therefore, a river in which the tide does not ebb and flow has no *shores*, in the legal sense of the term. It has *riparian* but not *littoral*. The term *shores*, however, when applied to such a river means the river banks above the low water mark; or, rather, those portions of the banks of the river which touch the margin or edges of the water of the stream. A grant, therefore, which is bounded by the *shore* of a *fresh water* river, conveys the land to the water's edge at low water. For the reasons given I shall vote to reverse the judgment of the Supreme Court, and to award a *venire de novo*, to the end that the jury may ascertain the part of the premises in controversy above ordinary low water mark, if any, which was in the possession of the defendants in the court below at the time of the commencement of this suit."

"When the land is described as bounding on the bank or shore of the stream, then the bank or shore is the monument instead of the stream, and the low water mark on the shore will be the boundary line.

"Where land is bounded by a common law navigable stream in which the tide ebbs and flows, the boundary is the high water mark on the shore, but in those states in which large rivers are held to be navigable, although the tide does not ebb and flow in them, the boundary line on those rivers is held to be at low water mark."

2 Am. & Eng. Ency Law, 504-505 and cases cited.

Bed of river—What is meant by the term, "The bed of the river?" Bouvier defines it to be "the channel of a stream; the part between the banks worn by the regular flow of the water." (Page 226, 1897 Ed.)

In the case of *Child v. Starr*, 4 Hill, *supra*, the court held that no part of the bed of the river passed under the conveyance, but that the grantee took only to low water mark, clearly holding that the bed of a river is the hollow basin through which the water of the river flows at low water mark.

"The thread of a stream is the middle line of the channel; that is, of the hollow bed of running water, when the water is at its ordinary stages." *Willey v. Lewis*, 11 Dec. Re., 607. Hamilton county common pleas, opinion by Saylor, J.

Counsel for the Hydraulic Company claim that the bed of the river includes everything from levee to levee and give Vattell's definition of the bed of a river. He says:

"It is the running water of a river which makes its bed, for it is that and that only which leaves its indelible mark to be readily traced by the eye; and wherever that mark is left, there is the river's bed. It may not be there today, but it was there yesterday, and when the occa-

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sion comes it must and will, unobstructed, again fill its own natural bed, and the owner of a river is entitled to its whole bed, for the bed is part of the river.

Again: "Shores or flats to be the space between the margin of a river at a low stage and the banks to be what contains it in its greatest flow." 3 Sumner, 178; 6 Mass., 436-439.

We have examined all the authorities cited by counsel for the Hydraulic Company, and do not find that any of them bear directly on the point in issue, or are in conflict with the law of Ohio, except the case reported in 3 Sumner. The case in the 42 Iowa is not in point, as it refers to riparian owners upon navigable streams and extends the boundary to high water mark. And, further, that where levees are the banks of a river, such levee becomes the boundary line at high water mark. This case is clearly in conflict with the Ohio decisions, and we quite agree with Judge Saylor in the case of *Willey v. Martin*, *supra*, that the doctrine announced will not apply in Ohio.

In the Missouri case, *Long v. Wagner*, 47 Mo., 178, the court simply determines that the intention of parties to a deed, in describing land, is to be deduced from the instrument, as in the case of any other contract.

The case of *Wood v. Appal*, 68 Pa. St., 210, is really a case in point for the plaintiff, for it holds that a call for a stream, as its boundary and the markings of trees on the bank or margin of a stream to identify lines run to the river, as well as courses and distances measured along the margin, will not restrain the title to the bank or margin only.

In *Fishing Company v. Carter*, 61 Pa. St., 211, holds that the title of the riparian owner extends to low water mark, not absolutely in tidal streams, but subject to public passage when the tide is high.

In *Storer v. Freeman*, 6 Mass., 436, the court holds that the owner of upland adjoining the sea is also owner of the flats to low water mark, if not more than 100 rods from the upland.

In *Hatch v. Dwight*, 17 Mass., p. 289, the court holds that the owner of a mill privilege on which a mill has formerly stood, but on which no mill is actually standing, is entitled to an action against one who by erecting a dam below renders the site useless for the purpose of erecting a mill.

In *Thomas v. Hatch*, 3 Sumner, 170, the court holds that a boundary on the bank of a river, referring to fixed monuments on the bank, limits the grant to the bank and excludes the flats.

The testimony in the case shows that it will take a rise of from five to six feet at the government gauge at Main street in order to cover the land in dispute with water from Mill street to the Webster street bridge. The testimony also shows that this land is dry for more than eleven

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months in the year. It further shows that in 1893 it was covered by water for twenty-three days; in 1894, three days; 1895, one day; 1896, seventeen days; 1897, seventeen days; 1898, twenty-seven days; 1899, nine days—a total of ninety-seven days in the last seven years, or an average of fourteen days during that period.

The land in dispute is about one and one-third miles in length and comprises about twenty-five acres, and if the Cooper Hydraulic Company is limited to the bed of the river between low water marks on either side, it will in no wise affect it in the control of the water for water privileges, and will not affect its operation and supply of water to its customers along the hydraulic.

Upon the contrary if the city should be limited to the land upon which the levee stood in 1872, a great embarrassment might arise to it. Mad river is a treacherous stream, and we are liable at any time to have a practical demonstration of the fact that the levee on the south bank of Mad river is not sufficient to hold the waters in check in time of high flood. If not, the levee will have to be made higher, broader and stronger, and it is reasonable to suppose that at the time the grant was made, the material to strengthen the levee, so as to protect the city from overflows in case of floods, should be taken from the ground adjoining the levee.

We have given this case more than ordinary consideration, aiming only to do what is right between the parties, and after reading over all of the testimony, and examining all the authorities cited by counsel on either side, and more in addition, I have come to the conclusion that a fair construction of the deeds referred to carries the northern boundary line of the city of Dayton to the south bank of Mad river at low water mark, when the water in the river is at its average and ordinary stage during the entire year without reference to the extraordinary freshets of the winter and spring or the extreme droughts of the summer or autumn, and that the Hydraulic Company is limited in its deed to the bed of Mad river between low water marks upon either side of the same.

If I am wrong in this matter, I have the satisfaction of knowing that I am in good company, because both Mr. McMahon and Colonel Corwin came to the same conclusion without the aid of the case in the 47 Ohio St., 386, *supra*,—two as good lawyers as ever practiced at the Dayton bar.

If I am mistaken, the error is not fatal. The testimony has all been transcribed, elaborate briefs have been prepared on both sides, and the circuit court will convene here next Monday and it is an easy matter to submit the controversy to them and get their judgment as to the construction of these two deeds.

The only apology I have to offer for this long opinion is the importance of the questions involved, and the amount and value of the property in controversy.

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A decree, therefore, may be taken in favor of the city of Dayton, quieting its title to the land described, as prayed for in the petition.

Edwin P. Matthews, City Solicitor of plaintiff.

Gottschall, Crawford & Limbert, and *McMahon & McMahon*, for defendants.

NEW TRIALS—BONDS.

[Lucas Common Pleas, April 7, 1890.]

*AMERICAN EXCHANGE BANK V. WILLIAM F. BRENZINGER ET AL.

1. NEW TRIAL MAY BE GRANTED UPON CONDITION.

It is not the duty of the court in all cases to either absolutely grant or overrule the motion for a new trial. Cases frequently arise where the motion for a new trial is addressed to the discretion of the court and in such cases, if a new trial is granted, it may be granted upon condition.

2. BOND REQUIRED A VALID COMMON LAW OBLIGATION.

Where the applicant for a new trial, through the inadvertence or misapprehension of his attorney, failed to offer material evidence upon the first trial and voluntarily, without fraud or mistake, gives a bond to pay any judgment rendered against him in a new trial, which is granted upon the giving of the bond, not because applicant was entitled thereto, but solely in furtherance of justice, such bond, unless prohibited by statute, constitutes a valid common law obligation.

3. GRANTING NEW TRIAL SUFFICIENT CONSIDERATION.

The granting of a new trial, under circumstances stated, where no legal right thereto existed in favor of the applicant, constitutes a sufficient consideration for the bond required.

4. RECEIVING BENEFITS—ESTOPPEL.

A party who voluntarily, without fraud or mistake, gives a bond required as a condition to a new trial, granted in furtherance of justice and to which applicant was not legally entitled, and who receives the benefit of a new trial, is estopped from denying liability under the bond.

5. WAIVER OF REFUSAL TO GRANT NEW TRIAL.

An error in overruling a motion for a new trial, which the court declines to grant unless applicant will give bond, is waived by subsequently giving the bond and obtaining the new trial.

PUGSLEY, J.

This is a demurrer to the petition, and was submitted to the court upon briefs. I will say that I have not had the benefit of an oral argument of this case, and while there is a very full citation of authorities in the briefs on various legal propositions, there does not seem to be such a clear application as I would like of these authorities to the facts of this case.

The petition shows these facts: The plaintiff brought an action in this court against the defendant, William F. Brenzinger, which was tried to a jury, resulting in a verdict in favor of the plaintiff for the sum of \$426.78. The defendant filed a motion for a new trial, on consideration of which motion the court refused to grant it, and ordered that it be overruled, unless the defendant would execute a bond to the plaintiff in

* The decision in this case was affirmed by the circuit court, 10 Circ. Dec., 775.

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the sum of \$500, with sufficient surety, conditioned that defendant would pay any judgment which the plaintiff might recover against him. The said defendant as principal and the other defendant, Carrie K. Brenzinger, as surety, executed and delivered to the plaintiff such a bond. On the execution and approval of the bond the court set the verdict aside and granted to the defendant a new trial. A new trial was had, and upon such new trial the plaintiff recovered a judgment against the defendant for the sum of \$326.41, and that judgment is still in full force, and is wholly unpaid. This action is brought upon the bond to recover of the defendants the amount of the judgment and interest and costs.

The substance of the contention on the part of the defendants, if I understand it correctly, is that the bond sued on was without consideration and void, for the reason that the defendants were compelled to give it in order to enable the principal defendant to avail himself of what was his strict legal right; in other words, the claim is that the defendant was entitled to have his motion for a new trial granted unconditionally, and that therefore the bond is not based upon a lawful consideration, and was not voluntarily given.

The petition shows that the court refused to grant the defendant's motion for a new trial unless he would enter into a bond to pay any judgment that might be recovered against him on such new trial. This was in effect saying to the defendant that he was not legally entitled to a new trial, but if he would give the bond required, the court, in the furtherance of justice and in the exercise of its discretion would grant him a new trial.

Strictly speaking, the motion was not granted on condition of the defendant's giving the bond, because the motion for a new trial was overruled, and the granting of a new trial was not done until the bond was given. Of course if it appeared that the court found that there was good ground for a new trial, but refused to grant it unless defendant would give a bond, it might justly be claimed, whatever the form of the order, that the court in effect granted a new trial on condition that defendant would give a bond. But this does not appear. The motion for a new trial was overruled, and if no bond had been given judgment upon the verdict would have followed. The bond having been given, the verdict was set aside and a new trial granted. In this collateral proceeding the presumption is that in overruling the motion the court acted correctly and in accordance with the law, and thereby found that there was no good ground for a new trial. It may be conceded that if the defendant was entitled as a matter of legal right to a new trial, it was the duty of the court to grant a new trial unconditionally, and if in such a case the court should grant a new trial on condition that the defendant give a bond, and then on the failure of the defendant to give the bond should overrule the motion and enter judgment on the verdict, such ac-

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tion of the court would be reversible error. But this concession does not dispose of the question which we have here. In this case it does not appear that the defendant was entitled to a new trial, and furthermore, the defendant complied with the condition by giving the bond. The error, if there was any, in overruling the motion, was waived by the defendant in giving the bond and asking and obtaining a new trial; and the question now is, not whether the court erred in overruling the motion for a new trial, but whether the defendants are liable upon the bond.

An examination of the statute relating to new trials and of the decisions of the Supreme Court shows that cases frequently arise where a motion for a new trial is addressed to the discretion of the court, and in such cases, where it is in the discretion of the court to grant or refuse a new trial, it is well settled that the court may grant a new trial upon proper terms or conditions.

In Ferguson v. Gilbert, 16 Ohio St., 88, it was held that a motion for a new trial based on the ground that counsel were led by a misapprehension of the law to abstain from offering evidence pertinent to the issue is addressed to the sound discretion of the court under all the circumstances of the case, and its action thereon is not subject to review upon error.

So also in the case of Smith v. Bailey, 26 Ohio St., 1, it was held that a motion for a new trial on the ground of newly discovered evidence is addressed to the discretion of the court, and its rulings thereon cannot be assigned for error, unless there was a manifest abuse of discretion.

In Heffner v. Scranton, 27 Ohio St., 479, the court recognized the rule that orders which lie within the discretion of the court may be made dependent upon the performance of conditions. The judge says in delivering the opinion of the court, "When the court has the power to allow or refuse, it may allow on terms which it sees fit to impose."

There is also a class of cases where the court may properly refuse to grant a new trial notwithstanding the positive provisions of the statute.

Section 5305, Rev. Stat., provides, in subdivision 5, that "a new trial shall be granted for error in the assessment of the amount of recovery, whether too large or too small, when the action is upon a contract or for the injury or detention of property;" and in subdivision 6 that "a new trial shall be granted where the verdict, report, or decision is not sustained by sufficient evidence or is contrary to law."

In Durell v. Boyd, 9 Ohio St. 72, which was an action for a conversion, the trial court finding on the hearing of a motion by the defendants for a new trial that the jury had erred in the assessment of damages to the extent of \$450, ordered that unless the plaintiff would remit from the verdict that sum, a new trial would be granted. The plaintiff entered the remitter and the court overruled the motion. The defendants excepted, and took the case up on error, contending that having found that

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the jury erred in the assessment of damages, it was the duty of the court under the statute to grant a new trial. The Supreme Court held that upon these facts there was no error in overruling the motion for a new trial.

In Pendleton St. R. R. Co. v. Rahmann, 22 Ohio St., 446, it was held that when the damages assessed by a jury in an action for a personal injury are excessive, but not in a degree to necessarily imply the influence of passion or prejudice, the court, in the exercise of a sound discretion may make the remitter of the excess the condition of refusing to grant a new trial.

In these and similar cases it is held that neither party can complain of the action of the court. The plaintiff cannot complain, because the action of the court was with his consent. The defendant cannot complain, because he is not prejudiced by a reduction of the verdict. He has the same right to object to the verdict reduced which he had to the original verdict, and no other or different right. These authorities are cited simply to show that it is not the duty of the court in all cases either to absolutely grant or overrule the motion for a new trial. If the granting of the motion is in the discretion of the court, it may be granted upon condition. If the evidence does not warrant so large a verdict, the court may refuse to grant the motion, if the amount for which the verdict is excessive is remitted.

In the case which has already been referred to—Heffner v. Scranton, *supra*—the trial court found that the verdict in favor of the defendants was against the weight of the evidence, and ordered that a new trial be granted to the plaintiffs on their paying the costs within a certain time. Thereafter it appeared that the plaintiffs had not complied with the order as to costs, and on motion a judgment was entered upon the verdict in favor of the defendants. This was held to be error, on the ground that having found that the verdict should be set aside, the court could not make the payment of costs a condition precedent to setting aside the verdict; and for that reason the order granting the new trial was regarded as an absolute order, and the provision as to payment of costs was regarded not as a condition precedent, but as a proper order which could be enforced by execution. It will be noticed in this case that the court found that the verdict was against the evidence and ought to be set aside. The question to be decided in that case, as stated in the opinion, was this: "Can the court make the payment of costs a condition precedent, to setting aside the verdict, when the court has already found and the record shows the existence of facts requiring that such verdict should be set aside?" That is the question which arose in the case, and it was answered by the court in the negative. It will also be noticed in that case that the condition on which the new trial was granted was not complied with.

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In both of these respects the case differs from the case at bar. Here it does not appear that the defendant was entitled to a new trial or that the court so found. On the other hand, from the fact that the court refused to grant the motion unless a bond was given, it sufficiently appears that the defendant was not entitled to a new trial. The court in the exercise of its discretion granted the new trial solely in consideration of the giving of the bond, as a matter of favor to the defendant and not because he had shown that he had good ground for a new trial. Many of the authorities cited by counsel for defendants are similar to *Heffner v. Scranton*, *supra*. They are cases wherein it was sought to reverse the judgment of the court in granting the motion for a new trial on condition, and then overruling the motion and entering judgment on the verdict because of failure to perform the condition. No case is cited by defendants where a new trial was granted on condition and the condition was performed, nor where a new trial which rested in the discretion of the court was granted on condition.

Let us suppose in the case at bar, as may, I think, properly be done under the allegations of the petition, and in order to support the correctness of the action of the court, (and, as I am informed, was the fact,) that the defendant, through the inadvertence or misapprehension of his attorney, failed to offer upon the trial material evidence, which he claimed would be produced upon another trial, and offered to give bond to pay any judgment that might be rendered against him, if he was allowed a new trial, and that the bond having been given, the court, soiely in furtherance of justice, and although the defendant was not legally entitled to it, set aside the verdict and granted a new trial. Under such circumstances, what good reason exists for holding that the defendants should now be relieved from their contract? The bond was voluntarily given. There was no fraud, nor mistake, nor coercion. The defendant received the benefit of a new trial which was granted to him solely on the faith of the bond, and the plaintiff, who in no way consented to the action of the court, lost the judgment which would have been entered on the verdict had not the bond been given. Simple justice to the plaintiff as well as goods morals require, as it seems to me, that the defendants should keep their agreement.

In *Battelle v. Connor*, 6 Cal. 140, the trial court granted a new trial to the defendant on condition that he should file a stipulation waiving all objections to the pleadings, and consenting that the case be tried on its merits. The defendant filed the stipulation required, and the new trial was granted, and the new trial resulted in a judgment for the plaintiff. Upon the trial, after the plaintiff had concluded his testimony, the defendant moved for a non-suit upon the ground that the complaint was defective. The refusal of the court to non-suit the plaintiff was assigned as error, and also it was contended that the court erred in imposing upon

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the defendant a condition to the granting of a new trial. I quote from the opinion of the court:

"The complaint was defective, in not joining the persons who were proper parties to the suit; but this objection had been expressly waived by defendants, in order that they might have the benefit of a new trial of the cause; and the court properly refused the motion. It is contended that the court erred in imposing terms upon defendants, for that the court had no power to require defendant to waive any legal objection to the pleadings. We have decided in the case of *May v. Hanson*, that the district court has power to impose terms to the granting of new trials in proper cases. Whether the case under consideration was a proper one, we do not think it necessary to determine, for the reason that we will not permit a party, after having complied with the terms proposed, and availed himself of the advantage of the order, to question its correctness."

And other cases might be cited to the same effect.

The mere fact that the bond was not given in pursuance of any statutory provision does not invalidate it. If it was not prohibited by any statute, and was voluntarily given, without fraud or mistake and upon a good consideration, it must be regarded as a valid common law obligation. The granting of a new trial upon defendant's request without any legal right to it was a good consideration for the bond, and having voluntarily given it, and having received the benefit of a new trial, it seems to me the defendants should be estopped from denying their liability. The bond was given, so far as appears, and received, in good faith. I am not aware of any rule of public policy that was violated; and, indeed, I do not understand that such violation is claimed.

For the opinion of the Supreme Court of this state in analogous cases I refer to *Miller v. Rhodes*, 20 Ohio St, 494; *Martin v. Bolenbaugh*, 42 Ohio St. 508.

My conclusions upon the whole case are that the bond was not executed as a condition to the exercise by the defendant of a legal right; that the granting of a new trial, being in the discretion of the court, was a good and lawful consideration for the bond, and that having voluntarily given the bond, and having received the benefit of a new trial, the defendant and his surety are liable for a breach of the bond.

The demurrers are therefore each overruled.

Smith & Beckwith and *U. G. Denman* for plaintiff.

W. H. A. Read, for defendants.

Superior Court of Cincinnati.

FORECLOSURE—JURY—RES ADJUDICATA.

[Superior Court of Cincinnati, Ohio, General Term, 1900.]

Smith, Jackson, and Dempsey, JJ.

CATHERINE M. BRIGEL ET AL. V. JEROME D. CREED.

1. FORECLOSURE NOT TRIABLE BY JURY.

An action to foreclose a mortgage given to secure a promissory note is not triable by jury.

2. DECREE MAY PROVIDE FOR EXECUTION.

In an action to foreclose the decree may contain a provision that if the proceeds of sale shall not be sufficient to pay the costs and the indebtedness, the plaintiff shall have an execution for the deficiency.

3. RES ADJUDICATA.

Before the decree in the foreclosure suit was entered the same plaintiff brought another action on his note in which he sought a personal judgment against the defendants. The same defenses were set up in the second action as in the first. Upon the trial of that case, in order to prove the indebtedness of the defendants to him, the plaintiff introduced the record in the other case, in which appears the finding of the amount due on the note. The court allowed the introduction of the record and held it to be conclusive on the question of the amount due.

4. COURT WILL PREVENT IMPOSITION.

But one satisfaction of the debt can be had and any attempt upon the part of plaintiff to impose upon the defendant by securing a double satisfaction would be prevented by a court by proper proceedings.

SMITH, J.

These two cases, entitled the same, may properly be considered together.

Leo. A. Brigel and Catherine Brigel his wife executed their joint and several note for \$15,000.00 to Jerome D. Creed and pledged as collateral security for the payment of the same 735 $\frac{1}{4}$ shares of the capital stock of the Jackson Brewing Company. The note was not paid at maturity. Subsequently Mr. Creed brought an action in foreclosure to sell the collateral security. It was an equitable action purely and the relief asked was the sale of the collateral security. No personal judgment was asked.

The court refused the demand of a trial by jury and after hearing the evidence in the case and the arguments of counsel, found that there was due the plaintiff the full amount of the note with interest and ordered a sale of the property provided the indebtedness was not paid before a certain date. The decree concluded as follows :

"It is further considered that if the proceeds of the sale of said stock shall not be sufficient to pay the costs and the amount heretofore found due to the plaintiff, the plaintiff shall have execution for any deficiency against the defendants, Leo. A. Brigel and Catherine M. Brigel, to all of which defendants except."

The action of the court in refusing a trial by jury was correct. The action was purely equitable—the foreclosure of a mortgage with inci-

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dental relief—and it is elementary law that in such an action the parties are not entitled to a trial by jury.

The right to insert in the decree the part just quoted, in which it is provided that if the proceeds of sale shall not be sufficient to pay the costs and indebtedness the plaintiff shall have an execution for the deficiency is so well settled in this state that we are not called upon to concern ourselves with the rule in any other state.

Giddings v. Barney, 31 Ohio St., 83; Hamilton v. Jefferson, 18 Ohio St., 427; Myres v. Hewett, 16 Ohio St., 456; Moore v. Stark, 1 Ohio St., 373; Maholm v. Marshal, 29 Ohio St., 615.

The decree in the foreclosure suit should be affirmed.

Before the decree in the foreclosure suit was entered, the same plaintiff brought another action on his note, in which he sought a personal judgment against the defendants. The same defenses were set up in the second action as in the former. Upon the trial of that case, in order to prove the indebtedness of the defendants to him, he introduced the record in the other case in which appears the finding of the amount due on the note. The court allowed the introduction of the record and held it to be conclusive on the question of the amount due. Judgment was therefore entered against defendants for such amount. It is contended that this action of the court was erroneous.

We think not. The amount due between the same parties was an issue in the former case and the finding made it *res adjudicata*. The circumstance that in the former trial the parties were not entitled to a trial by jury although if the issue had been tried in the second case the parties would have been entitled to a trial by jury does not detract from the force of the finding as *res adjudicata*.

It may be urged, however, that if the question at issue in the action on the note was *res adjudicata* by reason of the finding in the foreclosure suit, that the second action could not be maintained.

Passing by the question whether this issue was made by the pleadings in the second case and assuming for the sake of argument that it was, nevertheless it is not true that the finding in the first case was a bar to the action in the second case.

The right to maintain two separate actions, one on the mortgage for a strict foreclosure of the same and the other on the note secured by the mortgage for a personal judgment, was upheld and the reason for the right explained in Spence v. Insurance Company, 40 Ohio St., 518.

In that case the Union Central Life Insurance Company commenced an action in the court of common pleas of Clark county against George Spence and his wife upon a promissory note secured by a mortgage of lands in which the relief demanded was a finding of the amount due on the promissory note and a decree for the sale of the property described in the mortgage to pay the amount due on the note. No personal judgment was asked on the note.

Superior Court of Cincinnati.

While this action was pending the insurance company commenced an action in the superior court of Cincinnati against Spence, in which it demanded a personal judgment against him upon the promissory note. The defendant answered the pendency of the action in Clark county.

In deciding that such an answer was not good, the court said: "At common law three actions could be maintained concurrently upon a debt secured by mortgage—an action to foreclose, a personal action on the debt and an action in ejectment to recover possession of the mortgaged property. *Dunkley v. Van Buren*, 8 Johns. Ch., 380; *Delahey v. Clement*, 8 Ill., 201; *Joslyn v. Millspaugh*, 27 Mich., 517; 2 Dan. Ch. Pr., 815.

"The section of the code, Revised Statutes, section 5021, which provides that in an action to foreclose a mortgage a personal judgment may be asked for, recognizes the right to unite two of these actions, a right which existed without this provision. In an action for a foreclosure and for a personal judgment, the plaintiff may have both forms of judgment at the same time.

"This section of the code does not require the two remedies to be demanded in the same action, it is only permissive; separate actions may therefore be maintained, one to foreclose and the other for a personal judgment in the same court at the same time. If they may be maintained in the same court at the same time, and judgment in one action is no defense in the other, then the same consequence follows if the different actions are in different courts. The two actions are essentially different, one exhausts the mortgage security, the other affords a personal remedy; one may be maintained without personal service and the other may not. From this fact alone both actions at the same time in different courts may be necessary to furnish a complete remedy.

"It is urged by counsel for plaintiff in error that the second suit was not necessary, and therefore could not be maintained. The reason why a second action cannot be maintained for the same cause at the same time is, that it is not necessary. This, however, is where the object sought in both cases is the same. The actions here were for different purposes and different relief. In a case situated as this one was, the only way in which it could be shown that the second suit was not necessary, would be to show that the cause of action alleged in the second suit, by reason of the proceedings had in the first suit, had been satisfied, or a state of fact equivalent to a satisfaction. The pendency only of another action for the same cause was not enough. In this case the pendency only of the suit on the mortgage security of the debt was pleaded as a defense."

If any doubt remained upon this question after the decision in *Spence v. Insurance Co.*, *supra*, it has been entirely dispelled by the recent decision of the Supreme Court in *Doyle v. West*, 60 Ohio St.,

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443, in which it is said that "The finding of the amount due is a necessary predicate to an order of sale in a foreclosure proceeding, and the finding is a judicial determination of the amount. The defendant can take issue as to the amount claimed. Where issue is taken, it must be, and is heard as a question of fact; if no issue is taken, the finding is made as on confession. The policy of the law is against the relitigation of questions of law or fact, once heard and determined between the same parties. A question of fact once so determined is binding on the same parties in all subsequent litigation. It would be somewhat anomalous if, after the amount due on a note secured by mortgage, had been, on issue taken, heard and determined in a foreclosure suit, afterwards a suit might be brought on the notes, and the whole question again litigated. We regard the finding of the amount due in a foreclosure proceeding as a judicial determination of the question; and where it, or any balance, after applying the proceeds of sale, remains due and unpaid, a suit may be brought on the finding to recover the amount. We find nothing in the decisions of this state that conflicts with this holding."

It may be urged that as the decree in the foreclosure suit provided that an execution might issue in case the proceeds of sale were not sufficient to pay the indebtedness, there was no necessity for the second suit and therefore on the principle of *Spence v. Insurance Co.*, *supra*, it could not be maintained.

But slight reflection is sufficient to show that this provision for execution for a deficiency if the plaintiff desires to act under it is not necessarily the equivalent of a personal judgment.

(1) It does not become operative until a sale of the mortgaged property is first had and it is found that the proceeds of sale are not sufficient to pay the indebtedness. (2) It is never a lien upon any property except that which has been levied upon it under it.

But a personal judgment on a note may be secured without waiting for a sale which is often difficult to make and becomes a lien upon all the real property of the debtor within the county, from the day it is entered, or the first day of the term in which it is entered, according to circumstances. Such a judgment therefore secures to the plaintiff important rights which a mere provision for execution for a deficiency in a strict foreclosure suit does not; and the existence of the latter therefore does not bar the right to secure the former.

As confirmatory of what has just been said is the declaration of the Supreme Court in *Doyle v. West*, *supra*, at page 444, in which, referring to the finding of the amount due in a foreclosure suit, it says:

"It is not, as we shall see, a judgment with any of its incidents, but is a debt evidenced by record, and can only be discharged by payment. It does not become dormant in the sense that a judgment does (*Moore v. Ogden*, 85 Ohio St., 480), for it is at no time active in the sense that an execution can be issued upon it unless so ordered; and it does

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not become a lien upon the other lands of the debtor. These are the incidents of a judgment and distinguish it from a simple finding of the amount due on a mortgage."

It is scarcely necessary to state that but one satisfaction of the debt can be had and that any attempt upon the part of a plaintiff to impose upon a defendant by securing a double satisfaction would be prevented by a court by proper proceedings.

The judgments in both cases will be affirmed.

Jackson, J., concurs in judgment in first case and Dempsey, J., concurs in judgment in second case.

C. W. Baker and J. R. Sayler, for plaintiffs in error.

Lawrence Maxwell, Jerome D. Creed, for defendant in error.

STREETS—RAILROADS—DAMAGES.

[Superior Court of Cincinnati, Special Term, 1900.]

*ROBERT MITCHELL FURNITURE CO. v. C. C. C. & ST. L. R. R. CO

1. **STREETS—DELAYING TRAVEL—DAMNUM ABSQUE INJURIA.**

A mere delay in travel which may follow as a consequence of the lawful construction of railroad tracks in a street, is not a damage to property not directly abutting upon the street where the tracks are laid, for the reason that whatever injury is suffered thereby is an injury suffered in common by the entire community, and even though one piece of property may suffer in a greater degree than another, nevertheless the injury is not different in kind and is therefore *damnum absque injuria*.

2. **WHETHER RULE IS DIFFERENT AS TO CUL DE SAC, QUAERE.**

Whether the rule is different if the street upon which the tracks are laid is a *cul de sac* or blind street is a question not presented in this case and therefore no opinion is expressed upon it.

SMITH, J.

These actions the above entitled and same against the Baltimore and Ohio Railroad Company are brought to enjoin the defendant companies from laying four tracks each, eight tracks in all, running east and west in Central avenue, immediately north of Second street in said city; authority having been granted to them by the officials of said city by virtue of section 8283, Rev. Stat., of the state. The cases come before me on a motion to dissolve the temporary restraining order heretofore issued in them.

The undisputed facts are as follows:

Plum, Central avenue, John and Smith streets run north and south, and Second street runs east and west, intersecting the former streets.

Plaintiff is engaged in the manufacture and sale of furniture of all kinds, and is the owner of real estate on the west side of Central avenue and the south side of Second street, and extending westwardly to Smith street, on which it has located valuable buildings, lumber yards, sheds

* For previous decision of the general term in this case, see 9 Dec., 674.

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and other structures used in and for its business and occupied by itself, its tenants and sub-tenants.

The railroad companies are the owners of the property on both sides of Central avenue north of Second street, which are connected by the railroad tracks complained of herein.

Section 3283, Rev. Stat., is as follows :

"If it be necessary in the location of any part of a railroad to occupy public road, street, alley way or ground of any kind or any part thereof of municipal or other corporation, the public officers or authorities owning or having charge thereof and the company may agree upon the manner, forms and conditions upon which the same may be used or occupied; and if the parties be unable to agree thereon and it be necessary in the judgment of the directors of such company, to use or occupy such road, street, alley, way or ground, such company may appropriate so much of the same as may be necessary for the purposes of its road in the road in the manner and upon the same terms as is provided for the appropriation of the property of individuals ; but every company which lays a track upon any such street, alley, road or ground shall be responsible for injury done thereby to private or public property lying upon or near to said ground which may be recovered by civil action brought by the owner, before the proper court at any time within two years from the completion of such track.

The proposition upon which plaintiff relies to maintain these actions is that the construction of these tracks in Central avenue, although not opposite its property, is nevertheless an interference with its access, for the reason that the passing of cars thereon necessarily impedes travel along said street and this diverts travel from its property and impairs its value ; that such impairment of the value of property is a taking of it within the meaning of Art. I. Sec. 19, of the constitution of Ohio, which provides that before property can be taken for public use compensation shall first be made in money to the owner: that Section 3283 is intended merely to provide compensation for consequential injuries not covered by the compensation provided for the appropriation of property and is to be paid after the property has been taken, and is no defense therefore to actions such as these are.

It is admitted by the defendants that if the construction of these tracks in Central avenue not opposite the property of plaintiff is to any extent a taking of the property of plaintiff, that the actions of plaintiff are well founded ; but they deny that such is the effect of the construction of the tracks.

It is strenuously contended by the defendants that an abutting owner on a street has a property interest in that part of the street only which is embraced within his lot lines produced, and therefore that whatever interference with an owner's access arises from an obstruction in any

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other part of the street, is not a taking of property in the constitutional sense of that word.

I do not find it necessary to express an opinion in this case upon that question for the reason that while our Supreme Court, so far as I am advised has expressed no opinion upon it, yet the general term of this court in Fliehman v. Railroad Co., 11 Dec. Re., 548, and the circuit court in Wheeling & L. E. Railroad Co. v. McLaughlin, 7 Circ. Dec., 647, have decided that a mere delay in travel which may follow as a consequence of the lawful construction of railroad tracks in a street is not a damage to property not directly abutting upon the street where the tracks are laid, for the reason that whatever injury is suffered thereby is an injury suffered in common by the entire community, and even though one property owner may suffer in a greater degree than another, nevertheless the less the injury is not different in kind, and is therefore *damnum absque injuria*.

The decisions in the Fliehman and McLaughlin cases, *supra*, were carefully considered and, of course, are controlling with me.

It is urged, however, by plaintiff that it is entitled to an injunction on the authority of Pruden v. Cincinnati, 2 Dec., 200.

In that case the city of Cincinnati by an ordinance undertook to convert certain squares on Plum street on certain days of the week into a market place. The plaintiff, who was an abutting property owner, was granted an injunction against such a market, not only directly opposite his property, but also as to the squares not opposite his property, upon the ground that the city had no right to pass such an ordinance; that the market was a nuisance, and that the access to the property of plaintiff was affected injuriously, not only in degree but in kind from the property of the community in general.

The decision in this case was affirmed by the Supreme Court as stated in the journal entry of the court on the authority of Branahan v. Hotel Co., 39 Ohio St., 383.

The decision of that case is stated in the syllabus, and is as follows:

"Under authority of an ordinance of the city of Cincinnati, B. and others who were the owners and drivers of hackney coaches used and occupied the side of the public street on which the plaintiff's store rooms fronted, as a hackney coach stand, in such a manner and so constantly as to constitute an unlawful interference with the use and enjoyment of plaintiff's premises, and so as to render access to the store rooms of the plaintiff impossible. Held, that such grant was without authority of law, and constitutes no justification for obstructing the plaintiff's right of access to the street."

It will be observed that in the Branahan and Pruden cases it was held that the hacks in the one case and the market wagons and stands in the other were standing in the streets without authority of law, and at

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the time were interfering with the access to the property of plaintiff. It, therefore, necessarily followed that the plaintiffs were entitled to an injunction against the hacks and market wagons and stands because as to plaintiff's property they constituted a private nuisance. But the rule in Ohio has been settled since the decision of Parrott v. Railroad Co., 10 Ohio St., 625.

"That a railroad authorized by law and lawfully operated cannot be deemed a private nuisance."

Now in the case at bar, the tracks of the railroad company are in the street by authority of law, and there is no evidence to show that they are not to be lawfully operated. They cannot be held, therefore, to constitute a private nuisance, and the Pruden and Branahan cases are not in point.

It is true that since the decision in the Parrot case sec. 3283, Rev. Stat., gives a remedy to abutting owners of property or those "near to" the improvement for consequential injuries suffered by reason of the improvement but, such damages are those which but for the statute could not be recovered and are not, therefore intended as compensation for property taken as the term is used in the constitution. A person who suffers such damages is therefore not entitled to an injunction to prevent the laying of the tracks, there being no question as to the solvency of the railroad company.

There is a class of cases which it is contended establish a rule different from that laid down here, viz. *cul de sac*, or blind streets with no means of passing from the property except over the tracks; but as this case raises no such question, I express no opinion upon it.

Whether the municipal authorities acted wisely or, not in making this grant, is a question I am not at liberty to consider. To do so would be to usurp the power of the legislative branch of the government.

For the reasons stated the motions to dissolve the temporary restraining orders must be granted.

W. L. Dickson, for plaintiff.

Edw. Colston, S. O. Bayless, for defendant.

CONDITIONAL SALES—RES ADJUDICATA.

[Superior Court of Cincinnati, Special Term, 1900.]

MARY CAVANAUGH V. MOSES M. BLOOM ET AL.

1. CHATTEL MORTGAGES—CONDITIONAL SALES.

The mere fact of a sale of chattel property on installments is not sufficient to bring such a sale within the terms of sec. 4155-2, Rev. Stat., relating to conditional sales; there must be evidence that the title is to remain in the vendor. Speyer & Co. v. Baker, 59 Ohio St., 11, distinguished.

2. JUDGMENT—RES ADJUDICATA.

A judgment recovered before a justice of the peace for balance due on a purported chattel mortgage covering goods the title to which it is claimed by the vendee remained in the vendor, is *res adjudicata* in a subsequent suit to enjoin the sale of the goods upon execution.

JACKSON, J (orally).

In this action the plaintiff alleged in her petition that the defendants, partners as Bloom, Long & Company, were engaged in the "installment business," selling furniture, household goods and chattels to be paid for in the future, on equal installments; that on October 2, 1895, and on August 1, 1897, she purchased from the defendants certain household goods, and after making to defendants on each occasion a small cash payment, promised and agreed with defendants to pay the balance then due in weekly installments; that before she had removed any of said property purchased, or asserted any of the acts of ownership in the same, but simultaneously with the purported transactions she executed and delivered to defendants certain purported chattel mortgages to secure the deferred payments of the purchase money; that these sales from the defendants to her came within the provisions of sec. 4155-2, Rev. Stat., passed May 4, 1895, prohibiting the vendor from retaking property and chattels so sold without refunding a certain part of the purchase price; that the defendants without tendering to her fifty per cent. of the sum of one hundred and sixteen dollars paid by her on said purchases, did, on December 27, 1897, before William F. Gass, a justice of peace of Cincinnati township, Hamilton county, Ohio, commence an action against this plaintiff for the sum of \$60, balance due on a purported chattel mortgage, which soon thereafter went to judgment, and her goods were seized upon execution by the officer of the law; that she is indebted to said defendants in the sum of \$60, and at no time denied said indebtedness, but that she was prohibited from making an equitable defense in the magistrate's court by reason of the manner in which said suit was instituted; that the defendant threatened to and will sell said property so taken upon execution under the judgment recovered before the magistrate, unless restrained by this court from so doing. She therefore prays that defendants be perpetually enjoined from selling said property by virtue of said judgment and that they be compelled to return said goods to her.

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The defendants filed an answer which among other defenses, stated that the plaintiff did purchase certain household goods from them at the times and in the amounts as claimed, but that on the date of said purchases the full title to said goods was placed to and in said plaintiff, and that she executed and delivered to defendants chattel mortgages providing for the payment to defendants of the purchase price, so much thereof at once and the balance in weekly installments, and that on the default of any of the payments the mortgagees might, without demand which was waived, take the mortgaged property into their possession; that defendants began an action against the plaintiff before W. F. Gass, justice of the peace, of Cincinnati township, upon a bill of particulars, which set forth the above facts, and that there remained due and unpaid from plaintiff to defendants, as a balance due upon said mortgage, the sum of \$60; that summons was duly issued in said action and served upon the defendant therein, the plaintiff here; that judgment was thereafter rendered in said suit against this plaintiff and on said bill of particulars in the sum of \$60 and costs; that by reason of said facts, and particularly by reason of the terms of the mortgage, the defendants had the right to the possession of said mortgaged property, and saw proper to reduce their said debt, evidenced thereby, to judgment, and through their agents to turn out the mortgaged property and have it sold under the authority of the execution aforesaid for the payment of their debt due them.

The case was submitted to me upon these pleadings and the evidence, and after full argument.

The defendants contend that sec. 4155-2, Rev. Stat., applies only to those sales upon installments (conditional sales) where the title is to remain in the vendor, and to pass to the vendee only upon payment of a certain price, the value of such property, or any part thereof; and further, that there is no evidence in this case, aside from the delivery of property to the plaintiff and her immediate mortgage back of the same to the vendor, to show any agreement or understanding between the parties that the title to the goods was to remain in the vendor until the price thereof, or a certain part thereof, was paid. The defendants insist there must be evidence aside from the above transaction to show the title is to remain in the vendor. They also say that this action should be dismissed, because the plaintiff's remedy at law is fully adequate and complete. They further contend that although there may be a sale of goods and chattels on installments, the title to remain in the vendor, nevertheless the vendor had a perfect right to elect to treat the property as the property of the vendee, and bring a suit to recover the purchase price.

After reading the cases of Speyer & Co. v. Baker, 59 Ohio St., 11; Wurmser v. Sivey, 52 Mo. App., 424, and Dailey v. Singer Mfg. Co., 88

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Mo., 801, I have reached the conclusion that defendants' first contention is well taken.

Section 4155-2 Rev. Stat., in terms provides, that there must be an understanding or agreement that the title is to remain in the vendor. The mere fact of a sale on installments is not sufficient to bring such a sale within the terms of the statute. The statute applies only to sales of chattels, "to be paid for in whole or in part, in installments, * * * on condition that the same shall belong to the person purchasing * * * the same, whenever the amount paid shall be a certain sum, or the value of the property, the title to remain in the vendor, * * * until such sum, or the value of such property or any part thereof, shall have been paid."

Now, the case of Speyer & Co. v. Baker, 59 Ohio St., 11, turned upon the question of instructions to the jury; and the Supreme Court affirmed the judgment of the circuit court, reversing the judgment of the trial court, because the latter court failed to give certain instructions requested, and erroneously charged that the mere fact of delivery of certain chattels sold, accompanied by a mortgage back from the vendee to the vendor (notwithstanding there was testimony tending to prove that the transaction was in fact a conditional sale), was sufficient to take the case out of the purview of the conditional sales statute.

The opinion of the court in Speyer & Co. v. Baker, *supra*, proceeded upon the theory, that evidence was admissible to show that the sale was upon condition—was a conditional sale, the title to remain in the vendor until the purchase price, or a certain part thereof, was paid—and should have been admitted, notwithstanding the fact that the purchaser gave a mortgage back to the vendor. The court on page 24 said: "There was evidence at the trial, though it was not without conflict, from which the jury might have found that the sales made by the plaintiffs to the defendant of the property in question were conditional sales of the character defined by the statute; and the instructions which were requested, but refused by the court, were to the effect that if the jury should find the sales to be of that nature, the defendant's rights under the statute were unaffected by the mortgages given to secure installments of the purchase price of the property."

The Supreme Court held that there being evidence tending to show a conditional sale, that therefore that question, ought to have been left to the jury, but the court below withdrew that question from the jury entirely.

In Speyer & Co. v. Baker, *supra*, on page 27 the court say: "The cases of Wurmser v. Sivey, 52 Mo. App., 424, and Dailey v. Singer Manufacturing Co., 88 Mo., 801, * * * do not raise the questions presented in this case."

The Missouri cases which I have read hold that a delivery of property—chattels—to the vendee, with a mortgage back to the vendor to

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secure the purchase price, which is stipulated in the mortgage to be payable in installments, does not in and of itself constitute a conditional sale under a section similar to sec. 4155-2, Rev. Stat., that is, it is not a conditional sale.

Now, the evidence in this case is, by the plaintiff, that the defendants told her they did business on the installment plan. The defendants deny this; they deny that they ever told her so, and deny they did do business on the installment plan. They claim they simply sold goods outright, and always took a mortgage back from the purchaser to secure the deferred payments; and although the plaintiff testified the defendants said they did business on the installment plan, there was no testimony whatever to show there was any agreement, verbal or written, to the effect that the title of the property was to remain in the vendor until it was paid for; and the simple fact that goods are sold to be paid for thereafter, in installments, is not in and of itself sufficient evidence that the title is to remain in the vendor, and the statute applies only to such latter cases.

Speyer v. Baker, supra, case must, therefore, be distinguished from this case. There the question was, whether the jury should have been instructed to consider certain facts. Here, the case having been tried to me, without a jury, I am to find the facts.

I find there is no evidence in this case to show there was a conditional sale, the title to remain in the vendor until the purchase price was paid.

As to the other point of the defendants, I think that also was well taken. The judgment before the justice is *res adjudicata*, and is properly pleaded as a bar to the present action. The suit was upon an account for a balance due upon the chattel mortgage in question. It is true a magistrate's court has no equitable jurisdiction. You could not there ask to have the mortgage canceled, but you could say, this is a conditional sale and not a mortgage; that you did not owe any money on that account, or mortgage claim, because the transaction was not in fact a mortgage, but was a sale of the property on condition, and that you were not liable upon that account or mortgage because the title to the property had never passed to you; that you were only liable to pay when the title did pass to you, and so long as the title remained in the defendants, the defendants could not sue as upon a mortgage, but could only retake the property conditionally sold, upon tendering back to the purchaser, not less than fifty per cent. of the amount actually paid.

It seems to me on both the above grounds, the judgment should be for the defendants, and it is so ordered.

As to the other points made on the argument, I do not express an opinion.

L. H. Pummill, for plaintiff.

Burch & Johnson, for defendants.

WILLS—ANTE-NUPTIAL CONTRACT.

[Muskingum Common Pleas, June, 1900.]

NANCY KRIGBAUM v. ROBERT T. IRVINE, ADMR.

1. ELECTION BY WIDOW TO TAKE UNDER THE WILL. EFFECT.

Where a testator makes the same provision in his will for his widow that she would be entitled to by the terms of an ante-nuptial contract, and stipulates that it shall be in lieu of dower and in lieu of her rights under the ante-nuptial contract, the widow by electing to take under the will waives her right to dower and her rights under the ante-nuptial contract, and cannot afterwards claim either.

2. NOT ENTITLED TO CONTRIBUTION FROM OTHER LEGATEES.

Such a legatee has a right to a faithful administration of the trust on the part of her trustee, but she is not, when misfortune overtakes the investment made for her under the direction of the will, whereby the income is reduced, entitled, after the estate has been distributed, to ask other legatees to refund a part of their legacies to make good her loss.

3. "ANNUITY" DEFINED.

An annuity is a fixed sum granted or bequeathed, payable periodically, subject to such specific conditions as to duration as the grantor or donor may impose, and may, when the intention is expressed, be a charge on the real estate as well as on the person.

4. DETERMINING AS TO WHO ARE LEGATEES AND NOT ANNUITANTS.

Where, by the provisions of a will certain sums are set aside and invested and the proceeds are to be paid to certain persons during their lives, such persons are legatees and not annuitants.

5. WHEN AN EXECUTOR ACTS AS TRUSTEE AND NOT AS EXECUTOR.

Where an executor in carrying out the provisions of a will sets aside and invests certain sums, the income of which is to be paid to a certain person during her lifetime, he ceases to act as executor and as to that property becomes a trustee.

FRAZIER, J.

This case was submitted on the pleadings and the evidence. The petition of Nancy Krigbaum, plaintiff, v. Robert T. Irvine, administrator *de bonis non* with the will annexed of Henry Krigbaum, deceased, and others, avers, that on January 4, 1875, the petitioner, Nancy Krigbaum, entered into a contract in writing with Henry Krigbaum, deceased, whereby it was agreed between them, in consideration of a contract to marry, among other things, as follows:

"In case the said marriage shall take effect, and the said Nancy M. Walker" (*i. e.*, the petitioner in this case) "shall happen to survive the said Henry Krigbaum, he, the said Henry Krigbaum, does hereby charge upon his estate, as a debt, and upon his heirs, etc., for the performance of this covenant; that within a reasonable time after the death of the said Henry Krigbaum, his executor or administrator shall, from the personal or real estate or from both, as may be necessary and seem best, set apart the sum of four thousand dollars, the same to be by them invested as soon as practicable, in good safe bonds or stock or loaned upon real

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estate security, and the proceeds thereof to be paid to the said Nancy Krigbaum (Walker) annually during her natural life."

That is the antenuptial contract.

The plaintiff further says that she afterwards married the said Henry Krigbaum in pursuance of said contract; that the said Henry Krigbaum, in his lifetime, made and published a last will and testament, wherein, among other things, the said Henry Krigbaum duly ratified and confirmed the said contract, and incorporated the same in his said will, and made the same a part thereof.

Plaintiff further says that, on May 21, 1885, the said Henry Krigbaum departed this life, leaving said last will and testament, which was duly filed in the probate court of Muskingum county, and that plaintiff duly elected to take under the provisions of the will.

Plaintiff further says that, F. H. Southard, Esq., was duly appointed executor of said will by said court. Afterward, he resigned, and thereupon William Krigbaum was duly appointed and qualified administrator of the estate with the will annexed; and afterward, he resigned, and Robert T. Irvine, Esq., was thereupon duly appointed and qualified administrator *de bonis non* with the will annexed, and is still acting in pursuance of such appointment in the discharge of his duties.

The plaintiff further says, in her petition, that, shortly after the appointment of Mr. Southard as executor, he, Mr. Southard, purchased \$4,000 worth of stock of the Ohio Iron Company, for the purpose of owning and holding the same as such executor, and from the proceeds of the dividends which he expected to receive therefrom, he purposed and intended to pay to this plaintiff, as the widow of Henry Krigbaum, an annuity of two hundred and forty dollars per annum.

Shortly after procuring said stock, said Ohio Iron Company defaulted, and ceased to pay interest on said stock, or any dividend thereon; and that during the course of said administration, said administrators, as successors of said executor in the office of said trust, sold from time to time and finally disposed of all of said stock, from which she is informed said administrator has now in his hands, as proceeds arising therefrom, about \$800.

Then the petition further avers that she was never consulted or advised about the investment of these proceeds, and that she only learned of it long after said stock had become worthless.

Plaintiff further avers that the administrator *de bonis non* has failed and refused to pay her any income or proceeds from said sum of \$4,000 so set apart for her, or from any other source; and that the said Henry Krigbaum died seized of a large amount of real and personal property, which was devised to and divided among the beneficiaries of his estate.

The petition further avers that, in an action brought in this court, wherein said Nancy Krigbaum was plaintiff and William Krigbaum,

administrator *de bonis non* with the will annexed, was made defendant; it was considered, adjudged and decreed by this court as follows:

"The court do find that the allegations of the petition are true, to wit: Plaintiff is entitled to the income or interest upon said sum of \$4,000, commencing one year from the death of Henry Krigbaum May 21, 1886."

The petition further alleges that, the defendants, Mary L. Coon, Stanis Krigbaum and Altha Sutton, are legatees under said will, and that said administrator, Robert T. Irvine, has now in his possession certain funds, which the said defendants claim should be paid to them, or the interest thereof.

Plaintiff claims that her right to be paid said annuity out of the proceeds of the funds, is superior to the rights of these defendants, and prays for an order of the court, directing Robert T. Irvine, as administrator, to pay her said annuity subjecting all the funds and property of said estate to the payment thereof, and prays for an order of the court requiring said Irvine to take steps to procure from the assets of said estate, a sum sufficient to regularly and promptly pay said annuity.

To this petition, Robert Irvine files his answer and cross-petition, Mrs. Sutton files her answer, Stanis Krigbaum files his answer.

I find the following to be the facts in this case:

In 1875, the ante nuptial contract was made, as set out in the petition between Nancy Walker and the testator, Henry Krigbaum.

In 1885, Henry Krigbaum, the testator, died; his will was duly admitted to probate; F. H. Southard, Esq., the executor named in the will, duly qualified as such executor; and the widow duly elected to take under the will.

This will contains thirteen items, only the first ten of which have any bearing upon the controversy here.

Item one of the will bequeathed to Henry T. Krigbaum, as a special legacy, the sum of \$500.

Item two bequeathed to the son, G. D. A. Krigbaum, a special legacy of \$500.

Item three bequeathed to D. L. Krigbaum, a special legacy of \$1,000.

Item four bequeathed to the daughter, Mary L. Krigbaum, for and during her natural life only, the use and income of the sum of \$2,000, which the executor is, by the provisions of the will, directed to invest in such securities as to him may seem best, and hold in trust for her natural life, and pay to her the income and interest thereof, and upon the death of the said legatee, to divide the principal among the children, of the said M. L. Krigbaum, the legatee; if no children, then to her brothers and sisters.

Item five of the will provides as follows:

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"Whereas, I entered into an antenuptial contract, in writing and under seal, on January 4, 1875, with Nancy M. Walker, now my wife, wherein and whereby I covenanted that my executor should, within a reasonable time after my decease, set apart the sum of \$4,000, to be by my said executor invested in bonds or stocks or loaned upon real estate security, the proceeds thereof to be paid to the said Nancy M. Walker, now my wife, annually during her natural life; and whereas the said Nancy M. Walker in and by said contract agreed to accept the interest or income upon said sum of \$4,000, so to be invested as aforesaid and the same should constitute a jointure to the said Nancy M. Walker, in lieu of and in full satisfaction of any dower right, title, or claim, which might accrue to her by virtue of her marriage with me in any estate, real or personal or mixed which I might have at the time of marriage or subsequently acquire. Now, therefore, I hereby ratify and confirm said contract in every respect, and it is my will and I hereby authorize and direct my executor to take from the proceeds of the sale of personal property or real estate or both, the sum of \$4,000, as soon as the same can reasonably be done, and invest the same in bonds or stocks or loan the same upon real estate security, and pay over the interest or income thereof annually to my widow, Nancy M. Krigbaum, for and during her natural life. Said sum of \$4,000 shall be held by my executor in trust for the purposes herein expressed for and during the natural life of the said Nancy. After her death, I will and direct that the same be divided or distributed between my then living children, share and share alike. The provisions of this item are in confirmation and ratification of said marriage contract herein named and are not intended to be in addition thereto. Said Nancy shall have and enjoy the provisions of said contract for marriage, or the provisions of this will as she may elect, but she shall not have both, and her election to accept the provisions of the one shall be considered and held to be an abrogation of her rights under the other, and the provisions of this item are made and intended to be in lieu of any dower to which she would be entitled under the law as widow."

Item six of the will bequeathes all the rest and residue of his property, real and personal, to his nine children equally, E. L. Krigbaum, J. A. Krigbaum, Anna M. Musselman, W. C. Krigbaum, J. T. Krigbaum, C. D. A. Krigbaum, Altha Sutton, S. M. Krigbaum, and Stanis Krigbaum.

Item seven of the will provides that the entire interests of his son Stanis and daughter, Altha Sutton, received under his will, shall be held in trust for them by the executor, and he is authorized and directed to hold the same in trust, to invest the same in such investments as to him may seem proper, keeping the interest separate and distinct, and to pay over the income arising from the said investments, less taxes and expen-

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ses, to them separately during their lives, and upon their death, the principal is bequeathed to their children, if any; if not, then to their brothers and sisters.

Item eight of the will directs that all the estate, real and personal, be converted into money as soon as possible.

The widow elected to take under this will; Mr. Southard qualified as executor, and proceeded to the administration of the trust. He converted all the property of the testator, real and personal, into money, paid all the debts, all the special legacies, and took from, separated from the estate \$4,000, and invested the same in stock of The Ohio Iron Company, for the purposes of the trust, under the provisions of the will directing that the same be invested in trust for the widow. The income from this particular investment was paid to the widow for about twelve years, when the said iron company's stock ceased to pay dividends, the stock fell far below par, and eventually was sold under the order of the probate court. The sum realized therefrom was something over \$600.

The said executor, Mr. Southard, under the provisions of item four of the will, invested the sum of \$2000 for the use and benefit of the legatee therein named, the income of which was to be paid to the legatee, Mary L. Krigbaum, now Mary L. Coon. That sum is thus still kept intact, and invested under the trust provided for in said item; that said legatee, Mary L. Coon, is still living and has no children.

Said executor, under item seven of the will, took from the estate, the amount of the legacies provided in item six of the will, for the children, Stanis Krigbaum and Mrs. Sutton, and invested it in securities upon the trust provided in item seven of the will, the income of which has been paid to them; but of the amount so invested for Mrs. Sutton, the executor has only the sum of \$100. It appears that the fund set apart and invested for her was lost by reason of depreciation of the securities, or in some other manner, in which they had been invested. Each of the said legatees, Mrs. Sutton and Stanis Krigbaum, has children.

There are no other funds of any character or description, no estate of the testator in the hands of the executor unadministered, the estate having been fully settled in all other respects and all other property fully settled in all other respects and all other property fully administered. After the estate was settled, the funds set apart for the several trusts were invested upon the trusts provided in the will for the several beneficiaries, Mr. Southard resigned, and one William Krigbaum was appointed administrator *de bonis non*. While he was acting, a suit was brought in this court by the widow against the executor and others, but I find that the only issue tried in that suit was, "From what time should the legacy of the widow bear interest." There was no other adjudication, or no other question made in that suit.

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After the \$4,000 had been invested in the Ohio Iron Company's stock, upon the trust provided in item five, to be used for the benefit of the widow, by a proceeding in the probate court, the Ohio Iron Company stock was sold, and a sum something over \$600 now remains from that investment, in the hands of the present administrator *de bonis non.*

It will be observed that this will makes provision for four separate trusts. It specifically directs that the funds of Stanis Krigbaum and Mrs. Sutton shall be kept separate and distinct. These trusts are for four separate individuals, or beneficiaries. There is no dispute about the fact that the first executor took from, separated from the estate that came into his hands as executor, the sum of \$4,000, and invested the same in the stock of The Ohio Iron Company, and it is averred in the answer of the defense, and not denied by the reply, and was conceded at the hearing, that the money directed to be invested upon the trusts provided for the other beneficiaries, were separated, taken from the estate, and appropriated to the trusts provided by the will, and that the beneficiaries have been in receipt of the income therefrom ever since, except in the case of Mrs. Coon, and the widow for the last few years, when the funds appropriated to the trusts for them have been diminished by depreciation of the securities in which they were invested.

It was alleged by counsel for plaintiff that there are here only two questions for the court to decide. First, is the widow entitled to be re-endowed? Second, may she compel payment of her annuity, and is there any fund available from which her annuity can be paid?

It will be observed that this is not an action against the executor for *devastavit*. It is not an action to recover a legacy. It is not a suit upon the bond of an executor, and it is not an action for the assignment of dower. As to the plaintiff's first proposition, is the widow entitled to be re-endowed. By her antenuptial contract, the widow expressly waived her claim to dower. If Henry Krigbaum, the testator, had died intestate, the widow could not have been re-endowed in any part of this estate. She would have possessed her rights under her antenuptial contract. Her rights then would have been under the contract simply and solely; but the widow elected to take under the provisions of the will, and accepted the provisions of the will made for her, and the provisions of the will are made expressly for her in lieu of her dower. Having, therefore, accepted the provisions of the will, having made her election thereunder, she waived her rights under her antenuptial contract. She barred her dower by her antenuptial contract, and she waived both her dower and the rights under her antenuptial contract by electing to take under the provisions of the will. She is not, therefore, a doweress. Her rights must be determined simply and solely under the provisions of this will and sections of the statutes relating to election of widows to take under the will. *Cory v. Lamb*, 45 Ohio St., 203; *Spangler v. Dukes*, 89 Ohio St., 642.

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She has then only the rights of a legatee under the will, and cannot now relieve herself of the consequences entailed by her election to take under this will. This perhaps answers sufficiently the first proposition of plaintiff's counsel.

As to the second proposition, may she compel this administrator *de bonis non* to provide for the payment of this annuity and is there any fund from which the annuity can be paid? Is this plaintiff an annuitant? Is there any provision of the will that provides an annuity for her, or anything in this will, by any proper interpretation of it, that provides an annuity for the widow? Finding, as I have the facts as to the former suit, *i. e.*, that the only question adjudicated was the time from which the income of the \$4,000 should be paid, there is nothing in that suit adjudicating the questions in litigation here.

An annuity is a fixed sum granted or bequeathed, payable periodically, subject to such specific conditions as to duration as the grantor or donor may impose, and may, when the intention is expressed, be a charge on the real estate as well as on the person. See Amer. & Eng. Encl., of Law, 2d Edition, Vol. 2, p. 387.

By the terms of item five of the will, the executor was to set apart, segregate from the moneys which he should have from the conversion of the real estate and personal estate into money, the sum of \$4,000, and invest them, and hold them in trust during the lifetime of the widow, and to pay her the income thereafter annually; not a fixed sum, but only the annual income of said sum, an uncertain amount, at any rate a varying amount. Such provision has none of the ear marks or *indicia* of an annuity. Under the provisions of the will, she had a general legacy, simply this and nothing more. The legacy was not made a charge upon any of the property of the testator, and there is no provision in the will, either express or arising from necessary implication, that in the event of loss or diminution of the fund invested for her benefit, resort could be had to other funds, to make good the loss in her fund. The estate was settled; the debts were paid; the moneys for the four separate trusts were appropriated, and were invested upon the trusts provided for the four several beneficiaries.

How does the present executor or administrator *de bonis non* hold these separate funds? Does he hold as executor or as trustee merely? Suppose that the will, instead of making the executor several trustee for the four several beneficiaries, had appointed A. trustee for the widow, B. trustee for Mrs. Mary L. Krigbaum, C. for Stanis, and D. for Mrs. Coon, and that the executor had paid over the four thousand dollars to the trustee for the widow, A., and to B., C. and D., the sums for their several trusts. Here then, there would be plainly and clearly a severing of funds from the estate of the testator, and appropriation to

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the particular purposes pointed out in the will, and the executor's duty at an end. When, as in this case, there has been a separation of funds and an appropriation by the executor to the particular purposes pointed out by the will, does not the executor, who is also named trustee for the funds, lose his character as executor as to these trusts funds, and become simply and only a trustee? Is not that, after the severing and appropriation of the funds to the trusts specified, his sole character? If that be so, then these funds invested on trust for these legatees are no longer assets of the estate. As to them, he is not executor or administrator *de bonis non*, but is only holding them in the character of trustee, just as much as in the instance above mentioned, when the funds were paid over to the several trustees, A., B., C., and D.

"When an executor, who is also appointed trustee for the investment and application of legacies, has set apart and invested the legacies he will be considered to have divested himself of the character of executor quoad those legacies and to have assumed that of trustee. Consequently, if the trust fund be afterward lost, the legatees will have no further claim on the testator's estate." Hill on Trustees, 514.

On page 337 of the same authority, I quote a paragraph from a decision cited by this author, as follows: "The Lord Chancellor (Lord Cottonham), in deciding in favor of the plaintiffs, observed, 'The whole fallacy of the defendant's argument consists in trying this suit as a suit for a legacy. The fund ceased to bear the character of a legacy as soon as it assumed the character of a trust fund. Suppose the fund had been given by the will to anybody else, as a trustee, and not to the executor, it would then be clearly the case of a breach of trust. What he would have done by paying it to a trustee, he has done by severing it from the testator's property and appropriating it to the particular purpose pointed out by the will.'"

Again, in 18 Encyclopedia, 162: "When an executor, who happens also to be named a trustee of a legacy to be laid out in stock fully administered the estate and assented to the legacy, and retains the legacy in his hands, not as assets of the testator but as trustee of the legacy, then the principles which would apply to another trustee would apply to him. He is no longer clothed with the character of executor, but is, as to the legacy, a mere trustee."

Again, 1 Lewin on Trusts, 205: "Where a fund is given to a person upon certain trusts, and he is appointed executor, as soon as he has severed the legacy from the general assets, and appropriated it to the specific purpose, he dismisses the character of executor and assumed that of trustee."

"If the office of executor be, by the will, clothed with certain trusts, a person named as executor who *proves* the will and thereby makes himself executor, is held to draw upon himself the obligations knit to the office of trustee."

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And the same principle is recognized in several cases in our own Supreme Court.

"It is true, generally, that where a party acting in a double capacity is possessed of a fund in one capacity which it is his duty (so to speak) to transfer to himself in another, such transfer will be in law presumed." Wilson v. Wilson, 17 Ohio St., 151-156.

And in the case of Candolfo v. Walker, 15 Ohio St., 251, 274, I find the following:

"I admit that a testator may direct the continuance of a trade or business by his executor, as trustee, independent of his executorship; and such cases often occur. But they are always either where there is a devise or bequest to the executor in trust, or where part of the assets are specifically set apart and directed to be invested as a trust fund. In the former case the executor receives them at once as trustee, and they never become assets. In the latter, they are received by him as executor, and remain assets of the estate till so set apart and invested."

Now, unless those funds invested upon the trusts for the other beneficiaries, Mrs. Coon and Stanis Krigbaum, and the other legatee, can be treated as assets in the hands of the executor, then there are no assets applicable to make good the loss of the funds invested in trust for the plaintiff. That perhaps sufficiently answers the plaintiff's second proposition.

Mrs. Coon and Stanis Krigbaum and the other legatee are resisting any scaling down by the trustee of the funds so provided and set apart for them. I can find no authority under the facts, the circumstances, or the law applicable to this case, whereby that may be done. If the widow's fund of \$4,000, instead of depreciating and decreasing in volume, had multiplied ten fold, and had become worth \$40,000 instead of \$4,000 certainly the other legatees could not have come into court and have asked that she be cut down to \$4,000 and the \$36,000 excess turned over to them upon their trusts. In so far as the duties of the executor were concerned, they were fully executed and performed when the estate was settled up, and the sums provided for these legacies were set apart, separated from the estate, placed and invested upon the trusts provided in the will. When that was done, the executor became not a trustee of the four legatees jointly; he was as to each of them a several trustee, and the funds became the separate property of those beneficially interested, therein, the trustee having only the legal title thereto. Each of these beneficiaries, when the provision had been made, had the right to maintain his separate suit for an account against his trustee, and there would have been a misjoinder of parties, if they had all four come into court asking for an accounting touching the interests of any particular one. The widow could have asked for an accounting touching the trust funds for her benefit. She had a right to know when and how

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They were invested, and if there had been maladministration in them, she can be heard upon that question. She had a right to faithful administration on the part of her trustee. Misfortune overtook the investment for her, and it is now too late to ask all the other legatees to refund some part of their legacies to make good her loss.

It appears that there is something over \$600 in the hands of the present trustee of the original \$4,000. She is entitled to have the income of that paid to her annually, and the executor having charge of that sum will be directed to pay her the interest out of the moneys he has on hand remaining from the original investment of 4,000. I do not remember the exact sum. And the present administrator *de bonis non*, having asked the direction of the court as to the other legacies, I suppose that all that can be done will be to direct him to hold them as he has them, and pay the interest and the income to those respectively entitled thereto.

MUNICIPAL CORPORATIONS—ORDINANCES.

[Morrow Common Pleas, June, 1900.]

MORROW COUNTY ILLUMINATING CO. v. MT. GILEAD (VILLAGE).**1. RULE AS TO GRANT OF EXCLUSIVE PRIVILEGES.**

The streets of a city may be used for purposes authorized by statute in furtherance of the convenience and welfare of inhabitants and not substantially interfering with the public easement of right of travel, but when it is sought to couple with such partial appropriation a stipulation that no further use of unoccupied portions of the street shall thereafter be permitted or made for similar purposes, which is not an exercise of, but an attempt to prohibit appropriation, and when the effect is to create a monopoly, the power of a municipal corporation then to divest itself of authority conferred as a public agent must be clearly shown.

2. RULE APPLIED TO LIGHTING FRANCHISE.

An ordinance granting a franchise to an electric light company, containing a provision, which was part of the bid for the contract, that the contract shall not be binding upon the grantees unless they are granted the exclusive use of the streets for lighting purposes, is within the rule above stated and the ordinance is invalid.

3. AN ORDINANCE CONTAINING MORE THAN ONE SUBJECT IS INVALID.

An ordinance passed by the council of a municipal corporation which grants a franchise to use the streets and alleys of the municipality for the purpose of supplying electric light and power to citizens, and also contains a contract for the lighting of the streets and alleys at a stipulated price, is in conflict with sec. 1694, Rev. Stat., in that it contains more than one subject and is for that reason void.

4. CARE, SUPERVISION AND CONTROL OF ALL PUBLIC STREETS.

Every municipal corporation is clothed with power to protect itself, and the council has the care, supervision and control of all public highways, streets, avenues, alleys, sidewalks and public grounds, and none of these can be used for extraordinary purposes without the consent of the council.

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5. TERM "FRANCHISE" DEFINED.

"Franchise," in a general sense, is a liberty or privilege; a particular privilege conferred upon individuals by grant from the government. They are usually held by corporations created for the purpose of enjoying them.

HEARD ON DEMURRER to Petitions.

CAMPBELL, J.

The plaintiff in this case is a private corporation and the defendant a municipal corporation, each organized and existing under the laws of this state.

The plaintiff in its petition says, that, "the council of said village, in August, 1899, passed a resolution asking for bids for the erection of an electric light plant to be operated within said village for the purpose of furnishing light to the village and its citizens" and sets out a copy of said resolution, which will be referred to hereafter.

Then plaintiff states, that, pursuant to said resolution a certain proposition was made to the village council, by George M. Schambs, and copies such proposition in the petition, certain portions of which will be noticed farther along.

That on November 21, 1899, said proposition of George M. Schambs, was accepted and an ordinance passed by the council of the village, "authorizing George M. Schambs of Cardington, Ohio, his associates, successors and assigns, to erect, operate and maintain an electric light, heat and power plant, consisting of poles, wires, lamps and all other necessary appurtenances thereto, in and through the streets, alleys, public grounds, public ways and public buildings of the village of Mt. Gilead, state of Ohio;" followed by a copy of the ordinance, consisting of thirteen sections: "the terms, provisions and stipulations" of which the said George M. Schambs, for himself and his associates, accepted and agreed to be bound thereby.

That said George M. Schambs on December, 1899, caused a company to be incorporated under the laws of Ohio, in accordance with the terms and conditions of said franchise, being the right and privilege to erect an electric light plant in said village, and use the streets and public ways for such purpose; and such corporation is this plaintiff to which said Schambs assigned and transferred all his right, title and interest in and to the contract and franchise granted to him on November 21, 1899, by said village ordinance.

That on December 14, 1899, plaintiff accepted said assignment, and notified the village council of the same, and that it would fulfill all the terms and conditions of said franchise and contract, and that on December 13, 1899, said village council, without notice to Schambs or this plaintiff, passed an ordinance, attempting to repeal the ordinance granted to said Schambs and assigned to this plaintiff, and declared the same forfeited, null and void, which last ordinance plaintiff claims is void and of no effect, and sets out a copy thereof.

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The plaintiff then states in its petition, that it has expended large sums of money to carry out the objects and conditions contained in said ordinance; that it has made plans and specifications of the buildings and machinery necessary to equip an electric light plant: that it has entered into negotiations with different manufacturers throughout the country for the purchase of the necessary machinery for operating said plant, but defendant has refused and still refuses to allow plaintiff to complete said contract, or to exercise any rights under said franchise and ordinance, or to allow this plaintiff to open the streets or to erect poles thereon, or string wires, and that it is prevented from carrying out the terms and conditions of said ordinance by reason of the acts of defendant.

There is a further statement that said franchise is a valuable one, and that it would be difficult for plaintiff to state how much profit it could make by operating thereunder and also that it has no adequate remedy at law.

The plaintiff then prays that the ordinance passed December 13, 1899, attempting to repeal the ordinance passed November 21, 1899, be declared null and void—and that defendant be perpetually enjoined from in any manner interfering with plaintiff in the lawful exercise of the rights acquired by it under said ordinance; that defendant may be ordered to grant from time to time permission to this plaintiff to open the streets in said village; to erect said poles and string wires thereon; and that the court may compel the council of said village to perform each and every one of the terms and conditions of said ordinance, and for all other necessary and proper relief in the premises.

To this petition the defendant has filed a general demurrer, claiming that the facts stated therein are not sufficient to constitute a cause of action in favor of said plaintiff and against defendant; and two general propositions are advanced by counsel for defendant bearing upon the position thus taken.

First: That plaintiff, under the facts stated in the petition, has an adequate remedy at law if the grounds thereon stated are sufficient to constitute a cause of action of any kind.

Second: That the ordinance under which the claim is made by plaintiff is defective, or in other words, null and void; and two reasons are urged in favor of this position. First: that it is in violation of sec. 1694, Rev. Stat.

"A." It grants a franchise to plaintiff or some one to establish an electric light plant in the village of Mt. Gilead, with all that the term imports.

"B." It enters into a contract with the village, the defendant, for the furnishing of electric light for the public use. Second: It attempts to grant these privileges and enter into this contract with an unknown

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or unascertained party, namely: "George M. Schambs, his associates, successors and assigns."

If either of these propositions is upheld by the law, the demurrer should be sustained.

As to the first question: Sec. 1694, Rev. Stat., among other things provides as follows:

"No by-law or ordinance shall contain more than one subject, which shall be clearly expressed in its title."

Village councils may pass such by-laws and ordinances, only, as the laws of the state authorize and in the manner prescribed by statute and not otherwise.

Does this ordinance embrace only one subject, and is that subject clearly expressed in the title? If it does not, counsel for plaintiff concedes that the demurrer should be sustained.

To a proper understanding of the matter submitted, we must take into account the entire proceeding had by the council. In August, 1899, a resolution was adopted by council, instructing the clerk of the village, "to notify the Mt. Gilead Electric Light, Heat & Power Co., and the company represented by Mr. Schambs, that they were each requested to submit their proposition for lighting the streets, alleys and public grounds of Mt. Gilead;" and in the same resolution embracing details and requiring a statement of the kind and quality of all machinery and equipment to be used by the company submitting the propositions.

After the passage of that resolution, George M. Schambs submitted his proposition to the council, detailing at great length everything that could possibly have anything to do with a contract for lighting the said village streets, alleys and public grounds and signs it individually.

In that proposition is the following significant proviso: "The same only to become binding upon us, or the company to whom we shall assign this contract, when the village of Mt. Gilead shall be able to give us, our successors and assigns the undisputed right to a *franchise* through the streets, alleys and public grounds of your village, uninterrupted or interfered with by the company at the present time lighting the streets of your village.

"In other words, it is not the intention of the parties hereto to have this proposition become binding upon us, our successors or assigns, until the said village of Mt. Gilead, is in a position to give us, our successors or assigns, the exclusive right, if so they desire, to light the streets of your village and to furnish light, heat and power to your citizens."

That was something not comprehended in the resolution of the council, requesting propositions for lighting the streets of the village.

Same proposition to council contained the further statement, that within fifteen days from the time of the passage of the ordinance awarding the contract to Mr. Schambs, as per his proposition, and when the village

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of Mt. Gilead could assure the undersigned the free and uninterrupted use of the streets to carry out the proposition of their contract, "they will proceed to incorporate a company of sufficient capital stock to carry out all conditions of said contract and the undersigned will assign to said company all their right, title and interest to this contract, and such assignment will be filed with the clerk of the village."

The passage of the ordinance follows on November 21, 1899.

The title of this ordinance authorizes George M. Schambs, his successors and assigns to erect and operate an electric plant in the village of Mt. Gilead, and nothing more.

The first section of the ordinance corresponds with its title and some other sections define limitations and impose conditions.

Then section eleven awards a contract for the lighting of the village and upon terms therein stated for a term of ten years—at least forty-one lights at \$82.50 per year, and as many more as the necessity of the village required.

This section also provides that the franchise for operating and maintaining an electric light, heat and power plant shall extend and be in force for a period of twenty-five years from its date; and also says that the resolution, proposals and ordinance, which, with all and singular the stipulations therein contained, are to be a part of this contract."

Keeping out of the consideration the repeal of this ordinance December 18, 1899, what was and is its force and effect in law upon these contending parties?

If this was a valid ordinance, its repeal would not affect vested rights.

Every municipal corporation is clothed with power to protect itself and the council has the care, supervision and control of all public highways, streets, avenues, alleys, sidewalks and public grounds, and none of these can be used for extraordinary purposes, without the consent of the council.

Neither street railway companies, water works companies, telephone companies or electric light companies, can use any of the streets, alleys or public grounds of a city or village without first obtaining what is called a franchise; and a franchise can be granted only by ordinance of council, passed in the manner prescribed by statute.

"Franchise," in a general sense, is a liberty or privilege. "A particular privilege conferred upon individuals by grant from the government." They are usually held by corporations created for the purpose of enjoying them, such as railroad, telegraph, telephone, waterworks and electric light companies.

It is true, the granting power may impose conditions for their enjoyment and incorporate the same in the enabling act, but it is seriously doubted whether a corporation can acquire a monopoly by the exclusive

use of the streets of a city or village for any particular purpose. This restriction imposed by Schambs in his proposition submitted, was accepted by the council and incorporated in the ordinance and is therefore a part of it.

The streets of a city or village may be used for purposes authorized by statute in furtherance of the convenience and welfare of its inhabitants and not substantially interfering with the public easement or right of travel. But when it is sought to couple with such partial appropriation a stipulation that no further use of unoccupied portions of the street shall be thereafter permitted or made for similar purposes, this is not the exercise of the power of appropriation, but an attempt to prohibit its exercise; and when the effect is to create a private monopoly, the power of the city council thus to divest itself of authority conferred upon it as a public agent for the benefit of others, must be clearly shown. State of Ohio ex rel. Att'y Gen. v. Cincinnati Gas Light & Coke Co., 18 O. S., 262-293.

But aside from the question of the power of the council to grant the exclusive privilege guaranteed to plaintiff, it must be conceded that the granting of a franchise is one subject for the action of council, and can only be conferred by ordinance. It is therefore one subject.

It is claimed by defendant that the contract for the lighting of the village is a second subject, while the plaintiff insists that the ordinance contains only one subject, viz.: "the furnishing of electric lights to the village of Mt. Gilead and its citizens. All other matters contained therein are incidental to the furnishing of light." I have not been furnished with any citation of authorities on this question by either party. In fact, as far as I have been able to ascertain, there are no direct supreme court holdings covering the entire inquiry.

The case of "Elyria Gas & Water Co. v. Elyria (City), 57 Ohio St., 874, bears strongly on the question here involved under sec. 1694, Rev. Stat. The Elyria Gas & Water Co., was a corporation and resident tax payer long before in existence and brought suit against the city to enjoin the issue and sale of bonds of the city for the purpose of raising a fund to build water works.

The preliminary resolution declared that it was necessary to issue and sell bonds "for the purpose of the purchase and erection of water works;" and provided for the submission of the proposition to the electors of the city, at a certain time in the manner provided by law.

The resolution in that case was not read on three different days, nor was the rule dispensed with; but it was put on its passage immediately and passed.

This requirement of sec. 1694, Rev. Stat., it was claimed by the city did not apply, because the resolution was not of a general or permanent nature; but the supreme court held that when the same was carried

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into effect it must result in laying a general tax on all taxable property of the municipality, and was of a general nature.

The contention of the plaintiff in this case therefore is not sustained, as the ordinance contemplates the levy of a general tax upon all the taxable property of the corporation from its very nature.

In the Elyria case the language of the resolution was: "for the purpose of the purchase and erection of water works."

The court say: "The power conferred by the statute on the council is to issue and sell the bonds of the municipality, for the erection or purchase of water works." The two purposes are entirely distinct. The purchase of water works necessarily implies that they have already been erected and are a present existing property, the subject of sale and purchase; while the erection of water works can only have reference to their future construction. And further along the court say: A resolution declaring the necessity for the issue and sale of municipal bonds for the purchase and erection of water works is not a resolution for either purpose separately; but for both purposes combined; nor is a vote in favor of issuing bonds for both purposes, a vote in favor of either separately."

"A resolution declaring a necessity for one purpose, does not authorize proceedings for the accomplishment of another; nor does a resolution declaring a necessity for two or more purposes combined, authorize proceedings for the accomplishment of any one of them separately."

This decision is sweeping in its scope and settles the question of the exercise of doubtful powers. The first paragraph of the syllabus points out in no uncertain words what the proceedings of the council of any municipality should be as follows:

"The proceedings of the council of a municipal corporation must, in order to be valid, be within the powers conferred on it and in substantial conformity with the statute regulating them."

In the light of this holding, the ordinance in question is void, as not being in substantial conformity with the statutes regulating proceedings by village or city councils.

The case outside of Ohio most directly in point, is that of Missouri Pacific R. R. Co. v. Wyandot, 32 A. & Eng. Cor. Cas., 354, decided by the Supreme Court of Kansas.

The Kansas statute is exactly the same as ours:—"that no ordinance shall contain more than one subject, which shall be clearly expressed in the title." The ordinance passed by the city of Wyandot, extended the limits of the city, and appropriated funds to aid in building Riverview bridge.

The first section of the ordinance had reference to the extension of the city limits, and the second sought to appropriate \$3000.00 to aid in the construction of the bridge. Both purposes were mentioned in the

title. The court held this provision of the statute "is mandatory upon the city council."

"That an ordinance of a city of the second class, as was Wyandot, the title to which clearly indicates and the ordinance actually contains two separate and distinct subjects, having no necessary connection with each other, is void in toto from that fact and without reference to any other or further questions."

"When it manifestly appears, both from the title and body of such an ordinance, that it contains two separate, independent and distinct subjects of legislation, this court will not inquire whether one is without and the other within the power of the city council; nor will it investigate, whether or not one subject was used to induce the passage of the other, but will give to sec. 9 (Kansas Statute) of the act to incorporate cities of the second class, its clearly expressed meaning; that no city ordinance shall contain more than one subject; and if it does, it violates this provision and is void for that reason alone."

The trial court in this case held one section of the ordinance valid and the other void: but the supreme court held both void, citing numerous authorities in the text of the decision.

In one place the court say: "Two subjects shall not be embodied in one act to prevent certain evils of legislation, so that one cannot be an inducement to the passage of the other."

In the case at bar, but one subject is mentioned in the title;—that is, the granting of the franchise. No reference whatever to a contract for lighting the village; and if an ordinance, containing two subjects, "having no necessary connection with each other," the title of which contains two subjects, is void, with far greater propriety may we hold an ordinance embodying two subjects, one only mentioned in the title, utterly void. The village of Mt. Gilead was authorized by general statute to grant plaintiff the privilege of establishing an electric light plant within its limits, by ordinance properly passed; That is one subject. It also had the right to contract for the lighting of the town and that is another subject, and they are not necessarily connected with each other.

The granting of a franchise, or the privilege of using the streets, alleys and public grounds for this purpose, is without financial consideration on the part of the grantee. The public is presumed to derive benefits from such an enterprise, as an adequate return for such user; and the title of this ordinance indicates only the purpose of the Village Council to extend this privilege.

Take the ordinance as a whole in connection with the resolution asking bids from the company then existing in Mt. Gilead, and the one to be organized by Mr. Schambs, and the proposition of Schambs, that the same was made only upon the condition of the exclusive right to use the streets, alleys, etc., for the purposes sought. I cannot but regard it

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as an attempt to exercise powers without the pale of the law; and for reasons indicated, and supported by the authorities cited, hold it without binding force upon the defendant and void.

This action of the council was evidently taken under sec. 3471-4, which provides that the municipal authorities of any city, village or town in which any electric light company is organized, may contract with any such company for lighting the streets, etc or for furnishing water, etc., for a period of ten years and that the provisions of secs. 2702 and 2699 Rev. Stat. shall not apply.

It is claimed by defendant that this ordinance is void because not made with a company then organized.

Whether such a contract could be made with an individual, it is not necessary for this court now to decide. I may say, however, that corporations are not greater than individuals, and I can see no good reason why such a contract may not be entered into with a responsible individual, in a legal way.

In this case the council of the village was dealing with uncertainties. "Schambs, his associates and assigns" simply meant a corporation to be organized after the exclusive use of the streets, etc., and a contract to light the streets with forty-one lamps at \$82.50 per year had been guaranteed.

This corporation would not have been formed had either of these guarantees been withheld, and the council knew it; and courts will not look with favor upon methods such as are detailed in plaintiff's petition, in binding any municipal corporation for ten years, by terms so doubtful in their character as we find here.

Without expressing any opinion on the question of plaintiff having an adequate remedy at law, for reasons stated above, the demurrer will be sustained.

GEO. R. MCKAY, E. J. BANDIN and JOHN D. DE GALLEY, attorneys for plaintiff.

L. R. POWELL, attorney for defendant.

NEGLIGENCE—PLEADING.

[Muskingum Common Pleas, 1900.]

PETER SHRUM, A MINOR, ETC. v. C. & M. VALLEY RY. CO.**1. NOT NEGLIGENCE PER SE TO RIDE ON THE PLATFORM OF A RAILROAD CAR.**

It is not negligence *per se* to ride upon the platform of a railroad car; and where a passenger in a crowded railway car surrendered his seat to a lady and went out upon the platform, intending to go into another car, and it is alleged that the other cars were also crowded, and it is also alleged that plaintiff could not get back into the car which he had left on account of its crowded condition, it cannot be said that he was negligent in remaining on the platform.

2. DIRECT AND PROXIMATE CAUSE.

Where a petition alleges that a car was so overcrowded that the plaintiff was obliged to ride upon the platform, and that the train broke in two and the passengers inside the car rushed out and crowded the plaintiff off of the car, causing him injury, the overcrowding of the car was not the direct and proximate cause of the accident. In such case the breaking of the train was the proximate cause, and if it resulted through the company's negligence it is liable, but unless the petition alleges the breaking of the car as the negligent act it is subject to demurrer.

FRAZIER, J.

This is the action of Peter Shrum, by his next friend, versus the Cincinnati & Muskingum Valley Railroad Company. The original petition contains two causes of action. A demurrer was interposed to each of these causes of action in the original petition, and this demurrer was sustained as to the first cause of action and overruled as to the second cause of action. There has been no pleading, no supplement, by way of amendment to this second cause of action; but as to the first cause of action, there have been amendments, and the question I have considered relates to the demurrer as to the amended first cause of action. There having been no amendment to the second cause of action, the ruling on the original demurrer is still the ruling of this court, and the demurrer as to the second cause of action will be overruled.

This amended first cause of action presents some very interesting, as well as some very strange features, in brief, it sets out that Peter Shrum is a minor; the action was brought by his next friend; that the defendant was operating a line of railroad as a common carrier for passengers in this county; and that on July 19, 1891, the plaintiff purchased a ticket for thirty-five cents, in consideration of which the defendant agreed to carry the plaintiff from the depot in Zanesville to the depot in Dresden, and was in duty bound to carry the plaintiff from the said depot in Zanesville to said village of Dresden. After the plaintiff had entered one of the passenger cars of defendant as a passenger as aforesaid, after all the other seats in said car, and all the seats in all the other cars of the train to which said car was attached, were taken and occupied by passengers, whom the defendant had also undertaken to carry from said Zanesville to

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said Dresden, and while said car and said other cars were at the depot in said Zanesville, the said defendant, wantonly, recklessly, carelessly, and negligently, in violation of its duty to this plaintiff, then undertook to carry, as passengers, from said depot in Zanesville to said depot in Dresden, in said car and said other cars on said train, a great number of persons, and more than could find standing room in said car and said others cars and said platforms thereof; that said defendant then wantonly, recklessly, carelessly, and negligently, in violation of its duty to plaintiff, otherwise permitted, directed, and caused said car, on which the said plaintiff was a passenger, and all of said other cars of said train, to become so densely crowded and packed with said other persons, as to render the passage on said car intolerable, distressing, unendurable, fatiguing, and dangerous to the health and life of the occupants thereof. Said train left said depot in Zanesville, and while on the road to Dresden, plaintiff surrendered his seat occupied by him, to a lady passenger, who was then occupying the aisle of said car. Plaintiff, after surrendering his seat, as aforesaid, because of the crowded, unendurable condition of said car, left said car, for the purpose of seeking a seat or better accommodations in the car next in front. When he reached the platform of the car in which he was riding, he discovered the seats of that car were all occupied, that the aisle of that car was so densely crowded and packed with passengers as to leave no room in the interior of said car for plaintiff or any other passenger on said train other than those at that time occupying said car. Plaintiff, because of the crowded condition of the car in which he was riding, unable to find any seat, or standing room therein, was compelled to occupy a position on the platform of said car sustaining himself thereon by holding to the guard rail thereof. Owing to the crowded condition of the interior of said car, and the crowded condition of said other cars, so caused by the defendant as aforesaid, plaintiff was unable to find any place in the interior of said car, and was, therefore, compelled to occupy his position on said platform, with the full knowledge, consent, and acquiescence of said defendant and that said platform then afforded plaintiff a greater degree of comfort and as great a degree of safety to his person as any other part of said train which plaintiff could then occupy. While said train was en route, as aforesaid, and while plaintiff was occupying his position on said platform, as aforesaid, without any fault on his part, the said car in which plaintiff was a passenger, as aforesaid, became detached from the car immediately in front of it, thereby causing great excitement and commotion among the passengers in said detached car; and because of the overly crowded condition of said car, as aforesaid, the passengers occupying the passageway in the interior of said detached car rushed out and crowded upon said platform and against the person of the plaintiff, thereby causing him to lose his hold upon said guard, violently throw-

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ing him upon the ground while said car was in motion, whereby he sustained the injuries complained of in the petition.

I have said that this petition presents some strange features. First, plaintiff says, before the train left Zanesville, the defendant undertook to carry more passengers than could get upon the train, either in the car or on the platform thereof. He, by the averments of this petition, had a seat in the car, which he says became so densely packed as to render passage on said car intolerable, distressing, unendurable, fatiguing and dangerous to the life and health of the occupants thereof. The direct averment in this petition, is that these cars were jammed full, as well as the platform. Now, just how the plaintiff, after surrendering his seat, could have gotten on to a platform that was already more full than it would hold does not very explicitly appear in the petition; yet the averment is here, as the ground of negligence, the cause of his accident, that the passengers from the interior of the coach, which he left, rushed out, crowded upon the platform where he was standing, rushed against him and crowded him off. Now then, it appears that if they could rush from the interior of the car and out upon the platform against him, at that particular time the platform must have been free, so as to at least have afforded room for passengers to rush out and against him and crowd him off. So this cause of action in itself, it seems to me, has some very glaring inconsistencies in it.

It was urged, in the brief submitted by Judge Brasee, that inasmuch as the railroad company furnished this plaintiff a seat, the company had discharged its full duty to the plaintiff, and the company would not be responsible to him if he went upon this platform after that, and was thereafter injured. The argument of counsel for the plaintiff was to the effect that it is not *per se* negligence to ride upon the platform of a railroad car.

I have examined the authorities submitted on the argument and a good many others, and am satisfied that while there is some controversy about it, the weight of authority is that it is not *per se* negligence to ride upon the platform of a railroad car; but the authorities differ about that.

Mr. Wharton, in his work on negligence, lays down a principle rule that it is negligence to ride in and upon the platform of a railroad car, it is such a dangerous place as no careful person should take. Shearman & Redfield in their work, and the Am. & Eng. Ency. Law, and Beach, in his work on contributory negligence, lay down the rule that it is not *per se* negligence. Mr. Beach criticizes the authorities holding otherwise.

I will merely call attention to a few of these authorities. In *Worthington v. The Central Vermont Railway Company*, 28 Atl. Rep., 590, the syllabus is :

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"Where a passenger on defendant's excursion train secures a seat for himself, but afterward resigns it to a lady, and after remaining in the aisle of the car for a time, goes out on the platform, intending to enter another car, but finding that full, remains on the platform, from which he falls or is thrown off, he is guilty of contributory negligence, since he was not compelled to stand on the platform."

At page 592 of this same case, the authorities of this country are reviewed, and the result is, that outside of New York the authorities are at variance, and there is a criticism here of the New York cases, pages 592, 593.

On page 593, I find the following: "In Massachusetts the law is, as a general proposition, that standing on the platform of steam cars when the train is in motion is *prima facie* negligence."

And again: "But passengers, especially on excursion trains, must expect more or less discomfort, and must endure it rather than assume positions of danger and hazard, not provided for their occupancy, for the purpose of avoiding it. Necessity alone can warrant the assumption of such positions. If they are assumed as matter of choice and they contribute to injury, there can be no recovery. But what would constitute necessity in such cases is not easy to say. It may, perhaps, be safely said, in a case like this, when nothing is said or done by those in charge of the train to control or influence the conduct of the passenger, that the attendant circumstances must be such as not to leave the passenger free to choose, such as to coerce his action, and to compel him to assume the position as the best he could do at the time, acting as a careful and prudent man."

And again, in Goodwin v. Boston & M. R. R., 24 Atl. Rep., 816. "The riding upon the platform of a passenger car upon a railroad is such negligence, on the part of the passenger, as will bar his recovery for injuries sustained in being thrown from the platform," and the court, in passing upon this case, say,

"The danger of standing on the narrow platform of a passenger car, while the car is moving with the usual speed of railroad trains, is most conspicuous. No prudent man, no man ordinarily mindful of his conduct and of matters about him, would occupy such a position. The greater speed of the train, the more imminent the danger in such a place. Thoughtful people instinctively shudder when they see a person taking such risks."

"Counsel, however, urges in this case, there were circumstances which justified the jury in declaring Goodwin's conduct to be free from fault. He calls our attention to the circumstances that the day was very hot; that the cars were dusty and uncomfortably crowded; that no trainman showed him a seat, or advised him where he could find a seat; that the conductor took his ticket on the platform, and made no objection to his standing there; and that he did not see the sign on car door."

It seems that there was a sign upon the platform, upon the door of the car, perhaps warning passengers not to stand there. He says he did not see that.

"Did all these circumstances combined hide, in the least, the danger—make it less conspicuous and imminent? Would they in any way tend to throw a prudent man off his guard, or quiet his apprehensions of danger? All these circumstances may have made it more agreeable to ride upon the platform in the open air than to stand inside the hot and crowded car, but they did not in the least lessen the danger, nor the appearance of danger, in so doing. That Goodwin (the plaintiff) was not ordered off the platform, would not have led him to believe it was safe to ride there. He needed no warning of such a danger. He knew the place for passengers was inside the car. The discomfort of the hot and crowded car did not make it any more prudent for him to ride upon the outside upon the platform. Within the car, with all its discomforts, was safety. Without the car was obvious peril. The safe path is often more narrow and difficult than the way which leads to destruction, but no man is excused, for that reason, from seeking the one and avoiding the other."

Now, in this case, this case I have just read, it appears that if one is compelled, or takes a position upon the platform from necessity, not from choice, perhaps the inference is, that one is not guilty of negligence in getting upon the platform of a railroad car.

Perhaps it sufficiently appears in this case, that plaintiff was compelled of necessity, to remain upon this platform after he once got on it. He did leave his seat; surrendered that to a lady; got out upon this platform; then there is an averment in the petition that he could not get back, because the seats and the aisles were crowded full; so that, if he was not negligent in the first instance, in giving his seat to the lady and going out upon the platform, it cannot be affirmed that, under the averments in the case, he was negligent in remaining after he once got there, because it appears from the averments of the petition, that he could not do otherwise than remain there. That is one phase of the petition at any rate.

But the thing that has given me more trouble about this petition than any other is whether or not, conceding that the defendant was guilty of negligence in crowding the cars, the negligence complained of was the direct proximate cause of the plaintiff's injury.

Now as to the matter of pleading, I desire to call attention to an authority or two. Street Railway Co. v. Murray, 53 O. S., 570. "In an action for damages, to make such negligence actionable, it must appear that injury was directly caused thereby."

In Shearman & Redfield on Negligence, last Ed., sec. 26, I find the following in the foot note, and it is a citation from Judge Cooley's work on Torts.

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"When the act or omission complained of is not in itself a distinct wrong, and can only be a wrong through injurious consequences resulting therefrom, those consequences must not only be shown, but must be so connected by averments and evidence with the act or omission, as to appear to have resulted therefrom according to the ordinary course of events and as a proximate result of a sufficient cause."

And again, in Beach on Contributory Negligence, page 45, foot note. "Pleading. The complaint in an action founded on negligence must state facts, showing that the negligence was the proximate cause."

That is from the 104 Indiana, p. 64.

And in 16 Am. & Eng. Ency. of Law, 428, "It is a maxim that the law looks at the proximate and not the remote cause of an injury."

And in the foot note, "Negligence on the part of the defendant followed by an injury to plaintiff affords no ground of action, unless the proper causal connection can be shown to exist between the effect and alleged cause."

"The defendant is answerable for the consequences of negligence and not for its abstract existence."

Now then, as I have said, the question in this case is whether or not, conceding that the defendant was negligent in crowding its cars, it appears from the petition that the negligence complained of was the direct and proximate cause of plaintiff's injury.

Now as to what a direct and proximate cause is, perhaps I need not waste time in calling attention to authorities on that point; but was the over-crowding of this platform of the cars the direct and proximate cause of plaintiff's injury?

Shearman & Redfield on Negligence say, "The connection of cause and effect must be established," this is page 26, "and the defendant's breach of duty, not merely his act, must be the cause of the plaintiff's damage."

Mr. Wharton, in his work on negligence, says, sec. 138, "It has been said that there are two views of causation, so far as concerns liability for negligence. The first view is that a person is liable for all the 'consequences which flow in ordinary and natural sequence from his negligence; and second, that he is liable for all the consequences that could be foreseen as likely to occur.'

Then he says, "Can we regard the independent action of intelligent strangers as something that is in conformity with the ordinary natural law, or as something that can be foreseen or pre-ascertained?"

And he says, "This question must be answered in the negative, for the spontaneous action of the independent will is neither the subject of regular natural sequence nor of accurate precalculation by us and if not, it cannot be said to have been caused by us."

And then at sec. 155, he gives an interesting illustration, to show the necessity of instructions such as those just stated.

"A single illustration in addition to those already stated may here be given. A., B., C., D., E. and F., are standing five feet apart. A. negligently jostles B., knocking him down; B., instead of recovering himself, falls on C.; and C. falls on D.; and D. in the same way falls on E.; and E. on F. A., let us suppose, is a rich man. F. sues A., naturally preferring to select him who is able to pay as the party to redress his hurt."

Then he says, "Why go back to A.?" I do not care to read further, but he says, "The person who last caused the injury is the responsible party, and the only relief from the absurdity of such a proposition is in holding that the causal connection is broken by the intermediate negligence of a responsible independent agent."

Now, we all remember very well the famous squib case, where a lighted squib was thrown into the market place among the wares of another, who caught it up and threw it upon the table of another, and that second person caught it up and threw it upon the table of another, and then it was thrown by him and struck the plaintiff in the eye and put it out. There it was argued by no less a person than Blackstone, that the man who last threw the squib was the person who ought to be held liable, but the court held that in as much as these intermediate persons were acting through fright, and to that extent perhaps under compulsion, they were not responsible for the act of throwing the squib. It was the act of self preservation of life or property from danger, an act under the impulse of the moment, and so they held in that case, that the fellow who first threw the squib was liable to the party whose eye was put out.

But it appears from this petition, that there was another cause. There was a breaking of the train, and this acted upon the persons in the interior of the car, and they, through the commotion caused by the breaking of the train, rushed out from the interior of the car, and rushed upon and against the person of the plaintiff, and threw him off the car, and that he was injured.

Now then, it seems to me that the true theory of this case is, that here was the intervention of a passenger or of passengers (that appears from the averments of this petition), an undoubtedly responsible human agency, who caused this injury. It was not the mere over crowding of the car that brought about this injury. If something else had not happened, this injury never would have happened.

Take the case of Lehr v. the Railway Co., 118 N. Y., 556. I might state here that one paragraph of the opinion is in this case, "It cannot be held as a matter of law that a passenger who surrenders his seat when the car is crowded to one less able to stand, thus himself contributes to an injury caused by the company's negligence."

Now, in this case, the plaintiff got upon a street car that was crowded, and the platform was crowded. He gave his wife the seat he had, and,

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as I understand the case, got off at the rear platform, and walked around on the railing or side of the car, and got to the front platform, and he found that crowded full, and the report says, after riding in this position for a short distance, a movement of the passengers on the platform broke the hold of his right hand, which he was unable to regain, and thereupon he was forced, by the pressure of the crowd, from his place, and fell underneath the car. And again further on in the same report, it clearly appeared that the defendant attempted to carry more passengers than could sit or stand in the cars; that both platforms and other places were full to the utmost capacity. The action of persons so crowded together and the great force whch they exercise almost un consciously on each other is understood by carriers of passengers and their employees.

But now, in this case, this young man was not crowded off after the manner alleged in this New York case. He was not crowded off by a mere involuntary movement of the crowd of passengers, or swaying motion. Can it be affirmed that even though this company was negligent in crowding these cars, the over-crowding of them was the direct and proximate cause of plaintiff's injury. It seems to me the very reverse of that appears upon the face of this petition. He was on the platform of the car. The aisles, it says, were crowded, and yet these people rushed from the interior of the car, out upon the platform and crowded him off. As I have said at the outset, it could not have been crowded at that particular time, because the people from the interior of the car could not have rushed out and rushed against him had it not been otherwise.

Now it seems to me that the immediate cause of plaintiff's injury here was the rush of people from the interior of the car, out upon the platform and against him, crowding him off, but, as I have already said, that would not have happened had not something else have happened: (He would probably have been riding yet): and that the overcrowding of the cars is not the direct and proximate cause of plaintiff's injuries in that regard. If the overcrowding of the cars caused the injury, it was not necessary to allege that the breaking of the cars caused the passengers to rush out. If the mere overcrowding of the cars brought it about, then that is the direct and proximate cause of his injury, and it was sufficient to allege that and that only.

It is not alleged in this petition, or in this first cause of action, that the defendant company was guilty of negligence in the manner in which the car broke, or as to the breaking of the car. In the second cause of action, that is alleged; and for that reason, I think this second cause of action states a good cause of action, and being alleged in that way, that the breaking of the train in two then becomes the first direct and proximate cause of this injury. Just as in the squib case,

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that act operating upon the people in the car, causing them to rush out and against the plaintiff, brought about the injury. So that, the breaking of the car in two is the direct and proximate cause of this injury, and it does not result from the mere fact of the overcrowding of the car. That is only a remote cause or a mere condition and not a sufficient or efficient cause of the injury. That would have happened, in all human probability, if there had not been a soul standing in the car.

I find, as I said, that it does not appear from this first cause of action, that the defendant was guilty of negligence in the breaking of the car. That not being alleged as a negligent act, the first cause of action is amenable to demurrer and the demurrer will be sustained.

BOYCOTTING.

[Police Court of Cleveland.]

STATE OF OHIO v. E. C. JACOBS.

1. VALENTINE ANTI-TRUST LAW VALID.

The Valentine anti-trust law, 98 O. L., 143, providing that "a combination of capital, skill or acts by two or more persons, firms, partnerships, corporations, or associations of persons, or any two or more of them, to create or carry out restrictions in trade or commerce, are illegal;" and that "violation of either or all of the provisions of this act shall be and is hereby declared a conspiracy against trade," is not unconstitutional or invalid.

2. SCOPE OF THE LAW.

The law in question declares that "any combination of capital, skill, or acts by two or more persons, firms, partnerships, corporations or associations of persons, or of any two or more of them, for either any or all of the following purposes, shall constitute a trust." The first purpose named is "to create or carry on restrictions in trade or commerce." Therefore, any combination or confederation among two or more persons in restraint of trade or commerce comes within the express letter of this act.

3. COMBINATION OF TWO OR MORE WITHIN THE ACT.

A combination by two or more persons for the purpose of boycotting a third person is a violation of the provisions of said act and is a conspiracy against trade within said act.

4. PROOF OF COMBINATION.

In a prosecution for boycotting under this act it is sufficient to prove that a combination as defined therein existed and that the defendant belonged to or acted for or in connection with it, without proving all the members belonging to it, or proving or producing any article of agreement or any written instrument on which it may have been based, or that it was evidenced by any written instrument at all. The character of the combination alleged may be established by proof of its general reputation as such.

5. ACT OF ONE, ACT OF ALL.

Where several persons are proved to have combined together for the same illegal purpose, any act done by one of them in pursuance of the original concerted plan and with reference to the common object, is, in the contemplation of the law, the act of the whole party, and therefore proof of such act is competent evidence against any of those who were engaged in the conspiracy; and any declaration made by one of the parties during the pendency of the illegal enterprise, is evidence against himself and all the other

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conspirators, who, when the combination is proved, are as much responsible for such declaration and the acts to which it relates as if made and committed by themselves. This rule applies to the declaration of a co-conspirator, although he may not himself be under prosecution.

6. EVIDENCE OF PREVIOUS COMBINATIONS.

Where in a trial upon a charge of a criminal offense, it becomes material to prove upon the part of the state that a conspiracy existed between two or more persons, one of whom is being tried for the offense, evidence that the same persons were, shortly prior to or shortly after the alleged crime, engaged in a conspiracy to commit crimes of a like character, is competent.

STATEMENT OF FACTS.

Prior to July 1, 1899, defendant was in the employ of the Cleveland Electric Railway Company as a motorman, up to the time of the strike of the employees of said railroad, which occurred about July 1, 1899. The complaining witness, F. A. Reynolds, was the proprietor of a drug store on Euclid avenue in the city of Cleveland, close to the street car barns belonging to said Cleveland Electric Railway Company at the locality that is commonly known as Lake View. The said Reynolds had a soda fountain in his drug store, at which he retailed ice cream. Upon the breaking out of the strike or soon thereafter, the railroad company employed a number of new employees that were non-union men. These non-union men, or "scabs," as they were commonly called by the striking ex-employees, were quartered in rooms over the street car barns at Lake View. Reynolds had been selling to them against the wishes of the strikers, and for that reason had been boycotted by the strikers. A man by the name of Schindler had been selling ice cream to Reynolds for his soda fountain for two or three years prior to and up to this time. After Reynolds was boycotted the defendant Jacobs approached Schindler and "advised" him not to sell any more ice cream to Reynolds, telling him that if he did so he would have to take the consequences, and giving him to understand that he himself would be boycotted. Schindler was a manufacturer of ice cream and sold to a large number of places in different parts of the city, and, fearing a boycott, he ceased furnishing ice cream to Reynolds and refused to furnish him any more for the period of over two months. The defendant was charged with unlawfully becoming engaged in a conspiracy against trade, together with said Schindler, by then and there forming and entering into a combination of acts to create and carry out restrictions of trade and commerce. It was admitted by the defendant on the trial that he was "kind o' pushing the boycott out at Lake View." Evidence was offered and admitted over the objection of counsel for defendant, of threats made by the defendant to another merchant at Lake View to induce him to stop selling to the "scabs." The case was tried to a jury and defendant found guilty. On a motion for a new trial and in arrest of judgment, acting judge George R. Wolf, held as follows:

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"That portion of the act of April 19, 1898, found in 93 O. L., 143, which defines a combination of capital, skill or acts by two or more persons for the purpose of creating or carrying on a restriction in trade or commerce, and declared such combination to be a conspiracy against trade is a constitutional and valid act, and a combination by two or more persons for the purpose of boycotting a third person is a combination to create and carry out a restriction in trade and commerce and is a violation of said act. The act, while originally and primarily intended to suppress and control what are known as trusts and monopolies, is still so comprehensive and far reaching in its express terms as to extend to every combination by two or more individuals by their capital, skill or acts to create or carry on any restriction in trade or commerce. The boycott is undoubtedly such a combination by individuals for the purpose of creating and carrying out a restriction in trade. Its avowed purpose is to prevent dealing between certain individuals. It is a restriction or hindrance created by application of external force, to-wit, by fear of injury to the business or property of the person threatened and is distinctly a violation of the provisions of the act. There can be no doubt but that the business carried on by Mr. Reynolds as a vendor of ice cream and other goods is trade as contemplated by this statute. Under the laws of this state and of the United States, the right of citizens to congregate or organize for self-interest, so long as they do not invade the rights of other men, is acknowledged and can not be gainsaid and has not been gainsaid; but an organization or combination by two or more for the purpose of doing an injury or entailing a loss upon or interfering with the lawful rights of others is clearly, within the contemplation of the Valentine law, an illegal act.

"Where several persons are proved to have combined together for the same illegal purpose, any act done by one of them in pursuance of the original concerted plan, and with reference to the common object, is, in the contemplation of the law, the act of the whole party, and therefore a proof of such act will be evidence against any of the others who were engaged in the conspiracy, and any declaration made by one of the parties during the pendency of the illegal enterprise is not only evidence against himself, but against all the other conspirators who, when the combination is proved, are as much responsible for such declarations and the acts to which they relate, as if made and committed by themselves. This applies to the declaration of a co-conspirator although he may not himself be under prosecution. *United States v. Cassidy*, 67 Fed. Rep., 698.

"Under the above doctrine as declared by the United States court, the declarations of Schindler, a co-conspirator of the defendant, were properly admitted in evidence against the defendant, although Schindler was not placed on trial. Evidence was allowed at the trial to prove that

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a boycott in fact existed against Reynolds by common report among the people in the neighborhood. The act specifically provides for this method of proof, and by virtue of this provision, contained in section 6 of the act; namely, "the character of the trust or combination alleged may be established by proof of its general reputation as such," such evidence was admitted at the trial. Evidence was offered by the prosecution of similar acts committed by the defendant just prior to or just after the time of the alleged crime for which he was arrested in this action.

"Under the decision of the Supreme Court of the State of Ohio, in Tarbox v. State, 88 Ohio St., 581, and Jackson v. State, 88 Ohio St., 585, in a trial of a person charged with conspiracy, evidence that the same person was, shortly prior to or shortly after the time of, the alleged crime, engaged in a conspiracy to commit crime of a like character is competent."

Motion for new trial and arrest of judgment overruled and defendant fined fifty dollars and costs.

MEMBERS OF CONGRESS—ELECTIONS—CONSTITUTIONAL LAW.

[Cuyahoga Common Pleas, June 30, 1900.]

STATE OF OHIO V. L. A. RUSSELL.**1. STATE LEGISLATURE CANNOT INTERFERE WITH QUALIFICATIONS OF MEMBERS OF CONGRESS.**

It is not within the power of the state legislature to superadd anything to the qualifications of members of the congress of the United States.

2. CORRUPT PRACTICE AT ELECTIONS—VALIDITY OF ACT OF APRIL 8, 1896.

The provisions of the act of April 8, 1896, 92 O. L., 123, entitled, "An act to prevent corrupt practices at election," in so far as it relates to the office of representative in the congress of the United States, is unconstitutional, in that it seeks to impose additional qualifications, conditions and obligations upon candidates for or members of congress of the United States.

3. ACT IS VALID IN SO FAR AS IT HAS APPLICATION TO STATE OFFICERS.

The act of April 8, 1896, 92 O. L., 123, entitled "an act to prevent corrupt practices at election" is valid in so far as it applies to officers elective under the laws and constitution of the state.

STONE, J.

This action is brought by virtue of an act of the legislature of the state of Ohio, passed April 8, 1896, entitled "An act to prevent corrupt practices at elections."

The petition is filed by the prosecuting-attorney representing the state. And it is alleged that the defendant, being a resident of the state of Ohio and of the twenty-first congressional district of the state, was a duly and legally nominated candidate for representative in the in the congress of the United States from the twenty-first congressional district before the electors of said district at the election held on November 8,

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1898. That the defendant failed, within ten days after the holding of said election, or at any other time, to make out or file with the clerk of the county of Cuyahoga, any statement in writing, whatever, relating to, or setting out, or containing any of the matters named in section 4 of the act aforesaid, and failed to make out or file a duplicate of such statement with the board of elections, and failed to subscribe or swear to any such statement or duplicate thereof: whereby it is alleged the defendant became liable to the payment of a fine of one thousand dollars to the plaintiff, according to the provisions of section 5 of the act aforesaid, and judgment is asked for the sum named.

The case is before the court on demurrer to the petition, on the ground that the petition does not state facts sufficient to constitute a cause of action.

The defendant's chief contention is that the act under which this action is brought, is unconstitutional in so far as it relates to the nomination and election of members of congress.

Section 1 of the Corrupt Practices Act, or, as it is numbered in the present statutes, 3022-1, provides, among other things, that "No candidate for representative in the congress of the United States * * * shall, by himself or by or through any agent or agents, committee or organization, or person or persons whatsoever, in the aggregate, pay out, give, or contribute * * * any money or other valuable thing in order to secure * * * his election * * * in excess of a sum to be determined upon the following basis, namely: For 5,000 voters or less, \$100; for each 100 voters over 5,000 and under 25,000, \$1.50; for each 100 voters over 25,000 and under 50,000, \$1.00; and nothing additional for voters over 50,000. Any payment, contribution, or expenditure, or agreement or offer to pay, contribute or expend any money or thing of value, in excess of the limit prescribed by this act * * * is hereby declared to be unlawful and to make void the election of the person making it. * * *"

The important feature of this section of the law is to be found in the words last quoted, that is, "Any payment, contribution, or expenditures or agreement or offer to pay, contribute or expend any money or thing of value in excess of the limit prescribed by this act * * * is hereby declared to be unlawful and to make *void the election* of the person making it."

Section 3 is unimportant in the present consideration.

Section 4 of the act, now sec. 3022-4, Rev. Stat., among other things, provides that: "Every person who shall be a candidate at any election for any public office which under the constitution or laws of this state is to be filled by popular election, or for the office of representative in the congress of the United States, shall, within ten days after the election held to fill such office, make out a statement in writing and file the same

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with the clerk of the county in which he resides, and make out and file a duplicate thereof with the board officer or officers, if any, empowered by law to issue the certificate of election," etc.

Such statement shall set out in detail each and all sums of money contributed, disbursed or expended by him or by any other person by his procurement or in his behalf.

This statement is required by this section to be sworn to.

This statement required by sec. 4, was never made, it is alleged, by the defendant.

Section 5 of the act provides the penalty for failure to file the statement required by the provisions of sec. 4, that is, any person failing to comply with the provisions of sec. 4 of the act, shall be liable to a fine not exceeding \$1,000 to be recovered with costs in an action brought in the name of the state by the attorney-general or by the prosecuting attorney.

The act further provides that the amount of the fine shall be fixed within the limit of a thousand dollars by the jury, and should be paid into the school fund of the county.

Section 6 provides, among other things, that "No person required by the foregoing sections of this act to file a statement or statements, shall enter upon the duties of any office to which he may be elected, until he shall have filed all statements and duplicates provided for by the foregoing sections of this act; nor shall he receive any salary or emolument for any period prior to the filing of the same."

The sections from which I have quoted, I think, are the only ones that are directly involved in the consideration of this case, although incidentally I shall have occasion to refer to section 7.

It is the contention of the defendant that this act, in so far as it relates to the office of representative in the congress of the United States, is unconstitutional, because:

First—It prescribes qualifications for a representative in congress, in addition to the qualifications prescribed by article 1, section 2, clause 2, of the constitution of the United States, which is as follows: "No person shall be a representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of the state, in which he shall be chosen."

Second—It assumes that authority is vested in the state of Ohio to be the judge of the qualifications of a representative in congress, by declaring an election void upon the failure of the representative-elect to meet the qualifications prescribed in the act.

Third—It assumes that authority is vested in the state of Ohio to be the judge of elections of members of the congress of the United States

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and, proceeding upon this assumption, declares the election void upon the failure of the representative-elect to comply with the provisions of the act.

Under the constitution of the United States the states are given authority to provide the manner in which the election for representatives in congress shall be held, in these words :

" The times, places and manner of holding elections for senators and representatives, shall be prescribed in each state by the legislature thereof; but congress may at any time, by law, make or alter such regulations except as to the place of choosing senators."

This section is the only one in the constitution authorizing the states to exercise any control over federal elections. And it is insisted that the states' authority over congressional elections, or over the conduct of members of congress as such, at such elections, is limited to prescribing the time, place and manner of holding said election, and that the exercise of any authority not clearly included in the plain definition and construction of these words, is null and valid.

It has been repeatedly held that it is not within the power of state legislatures to superadd anything to the qualifications of members of the congress of the United States. The constitution has fixed the provisions as to the qualifications of such members. I have already stated the constitutional provisions, and the question is here presented whether the sections from which I have quoted, in any sense impose additional qualifications upon candidates or upon members in the congress of the United States. If this is an effort to add qualifications, then the act must fall.

McCravy, on Elections, 204, lays down the familiar doctrine :

" Section 226. The qualifications for federal offices are fixed by the federal constitution or federal law, and the qualifications for state offices, are fixed by state constitutions or state laws. It is not competent for any state to add to or in any manner change the qualifications for a federal office, as prescribed by the constitution or laws of the United States. Nor can the United States add to, or alter the qualification for a state office, as fixed by the state regulations.

" Section 227. The constitution of the United States fixes the qualifications of representatives in congress in the following words :

" No person shall be a representative who shall not have attained the age of twenty-five years, and have been seven years a citizen of the United States, and who shall not when elected be an inhabitant of the State in which he shall be chosen."

" A state law requiring that a representative in congress shall reside in a particular town or county within the district from which he is chosen, is unconstitutional and void."

There is no provision in the constitution that requires even that a member of congress shall reside in the district in which he is chosen ;

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the constitutional requirement being that he shall be an inhabitant of the state. Many years ago, I think along in the sixties, the question came up regarding the election of a congressman in the state of Massachusetts, who was chosen outside of the district in which he lived. The non-resident candidate was not only elected, but his election was approved by the house of representatives. The law in Massachusetts at that time provided as follows :

"For the purpose of electing members of the thirty-eighth congress of the United States, and in each subsequent congress, until otherwise provided by law, the commonwealth shall be divided into ten districts, each of which shall elect one representative *being an inhabitant of the same*, in the manner now provided by law."

(The words "being an inhabitant of the same," being italicized.)

The decision of that case arising under the laws of Massachusetts, was made the subject of a very able article in The American Law Review, Vol. 3, 1868-69,—an able review of the whole subject.

I will read a portion of that article :

"The constitution provides that : 'Each house shall be the judge of the election, returns, and qualifications of its own members.' By what is it to judge? It can only be by the constitution of the United States, the instrument to which it owes its existence and by which its powers and duties are defined. In judging of the 'elections,' and 'returns,' it looks to the constitution and finds this provision :

"The times, places, and manner of holding elections for senators and representatives shall be prescribed in each state by the legislature thereof; but congress may at any time, by law, make or alter such regulations, except as to the places of choosing senators."

"If the election of a member whose seat is contested is found to have been held in accordance with its regulations prescribed by the legislature in virtue of the power thus given, or with the regulations as made or altered by congress by law, and the members to have been returned by a majority of the legal voters composing his constituency, that is, if the electors who have the qualifications requisite for electors of the most numerous branch of his state legislature, then he is decided to be entitled to his seat as far as the matter of 'elections' and 'returns' is concerned. Next, as to the qualifications, the house recurs to the constitution but does not find, as in the case of the 'times, places and manner of holding elections,' that the qualifications 'shall be prescribed in each state by the legislature thereof,' but it finds these qualifications explicitly set forth in the following sections :

"No person shall be a representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state in which he shall be chosen"—a provision not referring the matter to the

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state legislatures, but settling it for itself. If no person shall be a representative who shall not have attained to the age of twenty five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state in which he shall be chosen, it follows, by a familiar rule in interpretation, that any person who has attained the age of twenty-five years, been seven years a citizen of the United States, and who is, at the time of his election, an inhabitant of the state in which he shall be chosen, may be elected a representative. Mr. Crittenden says, in his speech in the senate, March 5, 1856, on the Trumbull case, 'The very enumeration of these qualifications excludes the idea that they intended any other qualifications. That is the plain rule of ordinary construction.'

Senator Foote, of Vermont, in his speech on the same case, says, 'It comes within a familiar principle, that the enumeration of certain requisites of qualifications, or of certain disabilities to election, is the negative of all others, and is equivalent to a positive prohibition of all authority to impose any others.' And Judge Story, in his 'Commentaries on the Constitution,' sec. 625, says, 'It would seem but fair reasoning upon the plainest principle of interpretation, that when the constitution established certain qualifications, as necessary for office, it meant to exclude all others, as prerequisites. From the very nature of such a provision, the affirmation of these qualifications would seem to imply a negative of all others. * * * A power to add new qualifications is certainly equivalent to a power to vary them.'

And finally, Hamilton, in the 'Federalist,' No. 52, speaking of the constitutional qualifications, says, 'Subject to these reasonable limitations, the door of this part of the federal government is open to merit of every description, whether native or adopted, whether young or old, and without regard to poverty or wealth, or to any particular profession of religious faith.'

The reference made to the Trumbull case is worthy of a moment's further consideration.

McCrary, on Elections, sec. 228, says:

"The constitution of Illinois, of 1848, provided as follows:

"The judges of the Supreme and circuit court shall not be eligible to any other office or public trust of profit in this state, or the United States during the term for which they are elected nor for one year thereafter. All votes for either of them for any elective office, (except that of judge of the Supreme Court) given by the general assembly, or the people shall be void."

"The house of representatives held that this clause of the constitution of Illinois, so far as it related to the election of member of congress, was void, because in conflict with the federal constitution and also because it was an unauthorized attempt on the state of Illinois to fix or

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to change the qualifications of representatives in congress. Mr. Marshall and Mr. Trumbull, of Illinois, were elected representatives in the thirty-fourth congress. They had previously been elected, respectively, judge of the Supreme and circuit court of that state, for terms which had not expired. This was held to be no objection to their holding the office of representative in congress."

I will refer to another case which the defendant or counsel for defendant has very fully and exhaustively cited in his brief. This case was decided in the forty-second congress, and shows clearly the practice of the house of representatives in like cases.

A statute of Alabama was drawn in question, which empowered a board of supervisors of elections to hear proof upon charges of fraud, and upon sufficient evidence, to reject illegal and fraudulent votes cast, "which rejection so made as aforesaid" the statute declared, should be final, unless appeal should be taken within ten days to the probate court. The house in that case said, it is not competent for the legislature of a state to declare what shall or shall not be considered by the house of representatives, to show the actual vote cast for a member of congress, much less to declare that the decision of a board of county canvassers, rejecting a given vote, shall estop the house of representatives from further inquiry. The fact that no appeal was taken, does not preclude the house from going behind the returns and considering the effect of the evidence presented.

James Madison in discussing the constitutional provision, as to the qualifications for a member of the house of representatives in No. 52 of the Federalist, says :

" It has been observed that under the reasonable qualifications established by the constitution, the door of this part of the federal government is open to merit of every description."

Mr. Justice Story in his work on the constitution, following sec. 623, wherein he quotes Mr. Madison, says :

" The question is, whether the state can superadd any qualifications to those prescribed by the constitution of the United States.

" If a state legislature has authority to pass laws to this effect, they may impose any other qualifications beyond those prescribed by the constitution, however inconvenient, restrictive, or even mischievous they may be to the interests of the union. In short, there is no end to the varieties of qualifications, which, without insisting upon extravagant cases, may be imagined.

" A state may, with the sole object of dissolving the Union, create qualifications so high, and so singular, that it shall become impracticable to elect any representative.

" It would seem but fair reasoning, upon the plainest principles of interpretation that when the constitution established certain qualifica-

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tions necessary for office, it meant to exclude all others as prerequisites. From the very nature of such a provision, the affirmation of these qualifications, would seem to imply a negative of all others. * * * The house of representatives seems to have acted upon this interpretation and to have held that the state legislature has no power to prescribe new qualifications, unknown to the constitution of the United States."

Mr. Cooley in his "Constitutional Limitations," takes the same view of the case, in speaking of the construction to be given the constitutions, and on page 78 of his work says:

"When the constitution defines the circumstances under which a right may be exercised, or a penalty imposed, the specification is an implied prohibiting against legislative interference to add to the condition or extend the penalty to other cases. On this ground it has been held by the Supreme Court of Maryland, that where the constitution defines the qualifications of an officer, it is not in the power of the legislature to change or superadd to them, unless the power to do so, is expressly or by necessary implication conferred by the constitution itself."

An interesting case is that of State v. Gillmore, 20 Kan. Rep., 551. The legislature of Kansas passed a law containing this provision:

"Any state, district, city, county or township officer of this state for whose removal from office by impeachment there is no provision, (who) shall in any public place within the state be in a state of intoxication produced by strong drink voluntarily taken, such officer shall be deemed to have committed an offense against public morals and on conviction thereof shall be adjudged to have forfeited his office, and his said office shall thereupon be declared vacant by the court trying the case."

One of the members of the general assembly it seems was prosecuted for a violation of this act. The case was decided by Justice Brewer, now one of the justices of the Supreme Court of the United States.

"The constitution declares Article 2, Section 8, that, 'Each house shall be the judge of the election, returns, and qualifications of its own members.' This is a grant of power, and constitutes each house the ultimate tribunal as to the qualifications of its own members. The two houses acting conjointly do not decide. Each house acts for itself, and by itself; and from its decision there is no appeal, not even to the two houses. And this power is not exhausted when once it has been exercised, and a member admitted to his seat. It is a continuous power, and runs through the entire term. At any time and at all times during the term of office each house is empowered to pass upon the present qualifications of its own members."

Without spending further time upon it, it is sufficient to say that he held this act was void because it was in conflict with the constitutions of that state which provides that the general assembly shall be the judge of the qualifications of its own members.

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This sufficiently illustrates, I think, the trend and holding of courts where this question is involved, although I might refer to many other cases of the same general character.

The question, then, arises, under this act, Has the legislature here undertaken to impose additional qualifications?

It is due the legislature to say, that this act was not passed without having in mind at least this precise question, for it is to be observed that in sec. 7, the section which makes provision for preferring charges against public officers for violation of this law, with a view of ousting them from office to which they have been elected, they took care to exclude from the provisions of that section "members of the general assembly, and representatives in the congress of the United States," recognizing thereby the force and effect of the constitutional provisions to which I have referred.

While this section of the law has no application to members of the general assembly or representattves in the congress of the United States, it is certainly clear that candidates for representatives in the congress of the United States are included within the provisions to which I have called attention, namely secs. 1, 4, 5 and 6.

So the inquiry is, whether in these respects the legislature has exceeded its power under the constitution, and whether there is here added qualifications to the office.

It is to be noted, in the first place, that under the first section, the statute declares that if a candidate exceeds in his expenditure, the sum of money authorized to be expended, that act *shall make void the election* of the person making such expenditure.

This would certainly seem to impose conditions and qualifcations upon a candidate, that probably will not be found in any other state in the Union. I say that without any careful examination of the laws of other states. It may be that there is an act somewhat similar in some other states, but not generally,— and that I think, strikes right at the main question in the case; namely, whether you may impose upon the candidate for the office certain conditions, obligations and qualifications upon his election, that do not obtain everywhere in the United States, and obtain by virtue of the constitution and laws of the United States.

I am of opinion that these sections of the law seek to impose additional qualifications and that, being so, renders the act, in so far as it relates to members of the congress of the United States, unconstitutional and void. I am of the opinion that the same principle is involved in section 6, when it declares that "no person required by this section to file a statement or statements, shall enter upon the duties of any office to which he may be elected, until he shall have filed all statements and duplicates provided for by the foregoing sections of this act; nor shall he receive any salary or emolument for any period prior to the filing of

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the same." *That is a condition added.* It certainly can not be competent for the legislature of the state to declare that a candidate for the congress of the United States, after he has received the requisite number of votes for his election and which entitles him to hold the office of representative in the congress of the United States can not enter upon that office until he files some statement or statements with some officer. *That is a qualification not within the power of the legislature to establish.*

The Supreme Court of Ohio in *Mason v. State ex rel.*, 58 Ohio St. 80. *Held.* That there was nothing in this act that was in conflict with the constitution of this state.

The syllabus of the case is as follows: "1. The provisions of the act of April 8, 1896, entitled 'An Act to prevent corrupt practices at elections,' (92 O. L., 123) which direct the commencement of an action by the prosecuting attorney at the instance of the attorney general, for the purpose of inquiring into the title to an office of a successful candidate who is charged with the acts made unlawful by any law of this state, and which authorizes the court, upon finding any of such charges true, to render judgment declaring the election void, the office vacant, and excluding the incumbent therefrom, are not in conflict with the constitution, and are valid."

That was a prosecution against one Mason elected to the office of probate judge in this state, for violating the provisions of sec. 7 of the act under consideration, and a judgment of ouster was rendered against him in the circuit court. It does not appear that any federal question was raised in this case; nowhere in the briefs of counsel or in the decision by Judge Spear is there any reference made to the constitution of the United States or of the validity of the act in respect of the election of United States officers. While the act, therefore, is perfectly valid in so far as it has application to state officers, elective under the laws and constitution of the state, I am clearly of opinion that in so far as it undertakes to create qualifications as to representatives in the congress of the United States, and to impose upon such candidate or member special and unusual conditions in the nature of qualifications, to that extent that law is violative of the provisions of the Constitution of the United States. It is equally true, in my judgment, that if the legislature had no power to impose these conditions it was without power to impose a penalty for the violation of them.

The demurrer to this petition is, therefore, sustained.

Harvey Keeler, county prosecutor, for plaintiff.

L. A. Russell, for defendant.

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TOWNSHIP TRUSTEES—HAMLETS—ELECTIONS.

[Cuyahoga Common Pleas, June 21, 1900.]

W. H. LAWRENCE V. J. MITCHELL ET AL., TRUSTEES ETC.

1. DISCRETIONARY POWER OF TOWNSHIP TRUSTEES.

Where two petitions are filed with the township trustees upon the same day, though at different hours, each asking that an election be held upon the question of establishing a hamlet within the boundaries of the township, the trustees have, discretionary power to determine which petition they will direct a vote upon, and, in the absence of fraud or bad faith, their action in directing a vote upon the petition last filed is not invalid.

2. PROCEEDINGS FOR ESTABLISHMENT OF HAMLETS SUBJECT TO REVIEW.

Under Secs. 1561a, 1561b, and 1561c, Rev. Stat., providing for a petition to township trustees for the establishment of a hamlet, and proceedings thereunder, the same remedy is given as when the proceedings are brought before the county commissioners for the establishment of hamlets out of "allotted territory." Such proceedings are, therefore, subject to review, and, for proper cause shown, to reversal.

3. INJUNCTION NOT AUTHORIZED.

Where an election and the proceedings preliminary thereto, under Secs. 1561a, 1561b, and 1561c, Rev. Stat., for the establishment of hamlets are subject to a review, it cannot be said that such election will work irreparable injury to the inhabitants, or warrant an injunction to restrain the election.

4. ESTABLISHMENT OF HAMLETS BY TOWNSHIP TRUSTEES CONSTITUTIONAL.

The provisions of Sec. 1561a, 1561b and 1561c, Rev. Stat., authorizing the establishment of hamlets under the supervision of township trustees, are not unconstitutional, as being an unauthorized delegation of legislative power.

STONE, J.

This action is brought to restrain the defendants as trustees from conducting a certain election which they are proposing to hold on the twenty-third day of the present month, in Dover township, which election is called to vote upon the question whether Dover township shall be erected into a hamlet in accordance with the statute making provision for the creation of hamlets.

It appears from the pleadings, that on April 7, 1900, two petitions were presented to the trustees of Dover township, the purpose of each being to create or take the initial steps toward the creation of a hamlet. One is known as the "Matthews' Petition," requesting trustees to order an election upon the question as to whether the northerly portion of Dover township should be erected into a hamlet; that is, that portion of Dover township lying north of the south line of the New York, Chicago & St. Louis Railroad, to be known as the "Hamlet of Bay."

The other petition, known as the "Hurst Petition," asks the trustees for an election upon the question of creating a hamlet out of the whole territory of Dover township.

And this action is brought to enjoin an election ordered by the board of trustees upon the Hurst Petition.

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The petition is somewhat lengthy, but after reciting the fact of the filing of the Hurst Petition and a compliance with the provisions of Sec. 1561a Rev. Stat., it then gives a copy of the petition addressed to the trustees of Dover township, describing the territory sought to have erected into a hamlet, stating the number of inhabitants that the proposed corporation has, the proposed name of the hamlet, the names of the persons who are acting as agents of the petitioners, the fact that the petition was accompanied by a map describing the proposed territory or the territory proposed for incorporation, and the signatures of more than thirty electors residing within the territory described in said petition, and a majority of whom are free-holders.

The petition finally recites the objections that are urged or that are said to exist against the action of the trustees in this regard. And one claim is, that before the Hurst petition was presented to the trustees for the incorporation of the whole township, the Mathews petition for the incorporation into a hamlet, of part of the township was on file in the hands of the trustees and that it was their duty to order an election upon the Mathews petition. That it does not rest within the discretion of the trustees to elect between said petitions presented to them on April 7, but that they were bound by law and in good conscience to proceed to consider and act upon such petitions in the order of their presentation.

It is alleged that even if it did lie within the discretion of said trustees to consider and act upon the petition of Hurst and others, before considering and acting upon the Mathews petition, it would be wholly inequitable and work irreparable injury to the plaintiff and the residents of the northern portion of the township of Dover if such trustees should be permitted to take such action as would result in the creation of a hamlet containing all the territory now included within the township of Dover.

There is a further allegation, too, that there is a petition for mandamus pending in this court, awaiting action on the Hurst petition, and that if the Hurst petition should result in the incorporation of the whole township, it would render futile the proceedings under the alternative writ of mandamus. That the smaller territory would be swallowed up by the larger. That while said smaller territory, proposed to be incorporated as the hamlet of Bay, is suitable in size and character for hamlet purposes, yet it is said, the territory described in the Hurst petition includes all the territory lying within the boundaries of Dover township and is made up of farm lands in very large measure unallotted and used solely for agricultural purposes; and that such unallotted territory or land constitutes a vast proportion and majority of the territory of the township, and is wholly unsuited for the purposes for which villages and hamlets are incorporated; that the territory thus sought to be incorporated would make a hamlet unduly large; and that a hamlet

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is a municipal corporation and as such may exercise powers under the statutes of Ohio wholly inapplicable to the territory sought to be incorporated by the Hurst petition.

Complaint is also made that by this proposed change, if it shall be brought about by virtue of an election under the Hurst petition, it will largely increase the taxes of the township, and whereas now the trustees may levy for taxes, a township tax not exceeding one-fourth of one mill upon each dollar of taxable property therein ; that should the Hurst petition be granted and the entire territory of said township be incorporated as a hamlet, the trustees thereof would be authorized to levy a tax of ten mills upon each dollar of taxable property therein ; that while plaintiff and other taxpayers living within the territory proposed by the Mathews petition to be incorporated as the hamlet of Bay are willing to be taxed for purposes falling justly and reasonably within the scope of a municipal corporation of the grade to which the proposed hamlet of Bay would belong, they are wholly unwilling to pay, and it is inequitable that they be required to pay, taxes at a larger rate than now authorized by law if the same are to be diverted from such reasonable and useful purpose and made to contribute to agricultural regions at rates applicable only to municipal corporations.

And it is said that if the trustees are permitted to go on and hold this election according to notice, and thereafter deliver to the county recorder a transcript of their proceedings, and should said recorder thereupon certify and forward to the secretary of state, said transcript, said corporation will then claim to be a hamlet in accordance with the provisions of the sections of the statutes to which I have referred, to the irreparable injury of this plaintiff, and that costly and vexatious litigation will follow ; that the proposed election is an abuse of corporate power of the township and without warrant of law; and for these reasons, they ask that the court enjoin these defendants from further proceeding with this election.

By the answer of the defendants, issue is taken to the petition of the plaintiff, upon his claim that the Mathews' petition was first presented ; but claims, on the contrary, that the Hurst petition was first presented.

The real facts are, as shown by the evidence, that, on April 7, the Mathews petition was handed to the clerk of the township at 8:30 in the morning and by him marked upon the back thereof, "Filed April 7, 1900, at 8:30 A. M."

The Hurst petition was taken by the agent of the petitioners to the meeting of the trustees at the town hall, and laid upon the table, and by the clerk endorsed, "Filed April 7, 1900, 12:30 P. M." and was probably the first of the two petitions to which the attention of the board of

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trustees, when in session, was called; that is, their attention was first called to the Hurst petition although it was, as I have indicated, marked by the clerk of the township, Filed at 12:30."

Returning to the answer: They take issue with the claim that the petition presented by Mathews and others, contained an accurate description of the territory to be embraced in the contemplated township, and they deny that the map accompanying the petition was an accurate map of the territory.

They deny that their action under the said petition presented by Hurst and others, before acting upon the petition presented by Mathews and others, would be inequitable, or that it would work irreparable injury to the plaintiff, or to any resident of any portion of said township of Dover, or that it would render futile any writ of mandamus issued, or to be issued, by this court; and they deny that the territory of said entire township is wholly unsuitable for the purposes of a hamlet, or that the incorporation thereof would make a hamlet unduly large, or that it would result in costly and vexatious litigation.

Then they set out the fact of the presentation of the first petition, and their taking advice of the county solicitor, concerning their duties; that finally they received from him his opinion concerning the law of the case and their duties arising upon the presentation of the petition.

They admit that they acted favorably upon the Hurst petition, acting upon the advice of counsel and have called this election and are proceeding to and expect to hold the election on the twenty-third of the present month. They say that if, at that election, and as a result thereof, the proposed incorporation of Dover hamlet shall not be assented to by the voters of said territory, that is, if the result of that election be against the incorporation of the whole township as a hamlet, they will then proceed, after the correction of what they regard as some inaccuracies in the other application, to call for an election to vote upon the petition to incorporate the northern portion of the township into a hamlet according to the prayer of the Mathews petition and they say that they will do that without any order from the court.

The case has been presented upon such evidence as the parties cared to offer, and there is practically no conflict in the evidence. The facts as they exist are substantially admitted. The circumstances or the time rather, of the filing of the petitions with the trustees, I have already sufficiently canvassed to indicate what the facts were.

In view of the conclusions to which I have come in this case, it is not very material which petition was in fact actually filed first with the trustees. They had both before them for their consideration; they were filed the same day, and whether, as a matter of law, the filing with the clerk, was a filing with the trustees, is not important, I think, to be determined. They were filed the same day, they had both petitions before them for consideration at the same time; and in view of the com-

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plications thus created, or thus arising, they sought advise from the county solicitor, and postponed their actions from time to time until such advise was obtained; and then considering both cases, or rather considering the whole subject, they elected to adopt a resolution to conduct an election in accordance with the prayer of the Hurst petition and, in the doing of that in the absence of any fraud, I am inclined to think they had the discretionary power to determine which petition they would direct a vote upon. But it is, perhaps, hardly essential to have gone to that extent or to have expressed any opinion concerning their action in that regard.

Two questions are presented in this case, which to my mind are conclusive of the rights of the parties in this action.

First, it is claimed by counsel for defendants, that the action is premature—premature because the statute points out a remedy for any wrong that may be done in the carrying forward of proceedings of this sort, under secs. 1561a, 1561b, 1561c, Rev. Stat. Another objection which I regard as of equal consequence, is the one that an injunction will not lie to restrain the carrying forward of a public election.

Returning now to the first objection that is made: The sections to which I have referred, secs. 1561a, b, and c are the authority for the steps taken by the trustees. The first section provides for a petition to the township trustees for incorporation. Section 1561b, Rev. Stat., fixes the procedure that shall be had upon receipt of the petition. Section 1561c, Rev. Stat., provides for the election, and it also provides for a remedy by injunction or petition in error for a review of the proceedings had.

It is unnecessary to read these sections at this time. But, after providing for the time and manner of procedure for the election, it is provided in the latter part of sec. 1561c.

"The corporation shall then be a village or hamlet, as the case may be, under the name adopted in the petition, with all powers and authorities, and be recognized as such, the same as if such incorporation had been organized under chapter 2, division 2, title 12, of the Revised Statutes of Ohio, but no injunction shall be brought, as provided in sec. 1562 of the Revised Statutes of Ohio" (which is the last section in numerical order), "unless the same be instituted within ten days from the filing of the papers with the county recorder; provided, however, that the right of petition to the court of common pleas for error, shall exist as is provided for in the following sections of this chapter."

Section 1562, Rev. Stat., provides, under the title of "Injunction against recorder:"

"Any person interested may, within sixty days from the filing of the papers with the recorder, as above provided, make application by petition to the court of common pleas, or, if during vacation, to a judge

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thereof, setting forth the errors complained of, or the inaccuracy of the boundaries, or that the limits of the proposed corporation are unreasonably large or small, or that it is not right, just, or equitable that the Prayer of the petition presented to the board of commissioners be granted, or containing any or all of such averments, and praying an injunction restraining the recorder from making the record and certifying the transcript, as above required."

The original law only provided for proceedings of this character before county commissioners, and it is only in recent years that there was added to this statute these sections that authorize proceedings of this character to be brought before township trustees. It is clear, I think, that the same remedy is given in proceedings of this sort had before township trustees as may be had before county commissioners under other provisions of the statutes, for the incorporation of hamlets out of what is known as "allotted territory." So that, this is to be said: If the proceedings now going forward, under the Hurst petition are unauthorized, or if there is any error in the proceedings; if the boundaries are inaccurate, if the proposed limits are unreasonably large or small, or if it is not right, just or equitable that the prayer of the petition be granted, in this case, by the board of trustees of the township, the court may, by its order, reverse the proceedings or set them aside.

So that it can hardly be true to say that these proceedings, or this election will work to the plaintiffs "an irreparable injury," when the whole proceeding is subject to review before the court in the event that the election shall carry. It is not at all certain that any harm will come to the petitioners now, because the election may not result favorably to the petitioners and, if not, of course no harm has been done.

Another objection to which I have given some attention is, that courts ought not by injunction to interfere with public elections; and I have examined a number of cases upon that subject, which, it seems to me, are pertinent in the consideration of this question.

The case of *Harris v. Schryock*, 82 Ill., 119, was a suit that involved the power to hold an election. The syllabus is to this effect:

1. "The provision of the statute giving the board of supervisors power to form new towns, and to divide or enlarge towns, requiring a vote in case an incorporated town is to be divided, refers to incorporated towns and villages, and not to towns under the township organization law; and where no such incorporated town or village is to be divided, by any change of boundaries or the formation of a new town, no vote is required."

2. "The power to hold an election is political and not judicial, and a court of equity has no jurisdiction to restrain officers from the exercise of such powers."

Mr. Justice Walker, in delivering the opinion, says:

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"But according to the repeated decisions of this court, the power to hold an election is political and not judicial, hence a court of equity has no power to restrain officers from the exercise of such powers."

And the judge, in support of that proposition, refers to *Dickey v. Reed*, 78 Ill., 261, which is, perhaps, the most celebrated case of the kind in the state. In that case, the city of Chicago was about to hold an election under a recent act of the legislature, to determine whether it would adopt a new charter. The board of aldermen had called the election, and the election had been held, I believe, and the canvassing board was about to canvass the returns and declare the result; and it was sought to enjoin this board from canvassing such returns, on the ground that a great number of illegal and fraudulent votes had been cast. The suit was brought by the prosecuting attorney and five other citizens of the city of Chicago. The defendants were the forty aldermen of the city. A restraining order was granted the plaintiffs, whereupon the board of aldermen employed eminent counsel, who advised the board in writing, that the court had no power to grant an injunction, and advised them to disobey the order, and the board did so. Some time after this opinion was given, these attorneys were brought into court to answer for contempt of court, and each of the aldermen was fined \$100, and each of the counsel \$300. Upon appeal the court considered this case at great length and held that under the conditions that existed in that case, the court had no power to grant an injunction and, therefore, the parties were not in contempt for disobeying the courts order. They were all discharged.

The court said, in the second branch of the syllabus:

"A court of chancery has no power to restrain, by injunction, a board of canvassers from canvassing the returns of an election, where the law under which the election was held, neither in terms nor by implication confers such power, and where there are no facts before the court which require it to take judicial cognizance, and here, adjudicate a decree.

3. "While the writ of injunction is one of the most important in the law, and, is in fact, indispensable to the complete administration of justice, it is liable to great abuse, and it would not be wise, nor would it promote justice, to extend its use to cases of doubtful right, or to accomplish ends where there are other adequate remedies.

4. "A writ of injunction, issued in a matter where the court could not, under any circumstances, have power to hear, determine and decree in reference to such matter, is *coram non judice*, and void.

5. "When issued by a court having no power, need not be obeyed. Where a writ of injunction is issued by a court which has power over the subject-matter, and authority to take jurisdiction, it must be obeyed; but where the power of the court is wholly wanting, the writ is void, and

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can legally operate on no one, nor can any one be punished for contempt for disobeying it."

There is one other case to which I will refer, *People ex rel. Fitnam v. Galesburg*, 48 Ill., 485. The syllabus is as follows:

"Jurisdiction in chancery—Where there is a remedy at law, a court of chancery has no power to prevent the holding of an election of officers, upon the alleged ground of a want of authority to hold such an election, the remedy therefore being complete at law, by the writ of *quo warranto*."

That was a case to restrain the city of Galesburg from holding an election to elect supervisors to represent the city in the board of Knox county. And it was in the opinion in that case, that the court said:

"A temporary injunction is but a matter of discretion, and a court would hesitate long before granting an injunction to stop the holding an election, or to prevent an officer from entering upon the discharge of official duties, even if equity had jurisdiction, at least until after a final hearing of the case. We are aware of no well-considered case which has enjoined the holding of an election, or prevented an officer of the law from giving the required notices for, or the certificate of election. To sanction the practice of granting temporary injunctions in such cases, would be highly calculated to obstruct the various branches of government in the administration of public affairs. Courts of equity can have no such power, otherwise any and all elections might be prevented, and government greatly embarrassed."

In *Holmes & Gray v. Oldham*, 1 U. S. C. C. (1 Hughes), 76 the court held:

"A bill of injunction will not lie in the United States circuit court to enjoin defendants, who are registering officers and tree-holders of election in a city or a state, from registering voters or holding an election in pursuance of state legislation and municipal charter."

The constitutionality of the statute under which these proceedings were had, is questioned by counsel for plaintiff, in that this statute involves on the part of the legislature, an effort to delegate legislative power, and is therefore void. I do not think there is anything in this legislation, so far as the referendum clause is concerned, that renders it open to constitutional objection.

The case of *Cincinnati, Wilmington and Zanesville R. R. Co. v. Commissioners*, 1 Ohio St., 77, decided by Judge Ranney, was a case where the county of Clinton, as I remember, from reading it, voted to bond the county for \$200,000 to aid in the construction of a railroad known as The Cincinnati, Wilmington and Zanesville Railroad, and a majority of the qualified voters approved of it; and the question subsequently arose as to the validity of the proceedings. The syllabus in part is as follows:

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"The power of the general assembly to pass laws cannot be delegated by them to any other body, or to the people."

The criticism suggested here, is that this was a delegation of power and that for that reason, they ought not to be permitted to maintain this action. But Judge Ranney, in that very case, saw nothing to criticise in respect to that claim. He says, after some preliminary observations:

"And this brings us to the specific objections relied upon to show the act in question a nullity. They are: 1st. That the act was not passed into a law by the general assembly, but was made to depend for its effect upon a vote of the people of Clinton county; and this involves an attempt on the part of that body to delegate legislative power."

I will not take the time to read what Judge Ranney so well and so clearly says, other than these words:

"But while this is so plain as to be admitted, we think it equally undeniable, that the complete exercise of legislative power by the general assembly does not necessarily require the act to so apply its provisions to the subject-matter as to compel their employment without the intervening assent of other persons, or to prevent their taking effect only upon the performance of conditions expressed in the law."

"Indeed, the whole body of our legislation, as well as that of every other state, is divided between laws which imperatively command or prohibit the performance of acts, and those which only authorize or permit them."

This decision would seem to be opposed to counsels' contention. I am unable to see, from any view I may take of this case, upon what theory the action can be maintained, and for the reasons given the prayer of this petition must be denied, and the petition dismissed.

*Garfield, Garfield & Howe; William O. Mathews, for plaintiff.
County Solicitors Kaiser and Taft; Geo. L. Phillips, for defendants.*

HIGHWAYS—TELEPHONE POLES—INJUNCTION.

[Clinton Common Pleas, July, 1900.]

LOUIS C. DENVER V. UNITED STATES TELEPHONE CO. ET AL.

1. TELEGRAPH AND TELEPHONE LINES—ADDITIONAL BURDEN.

The construction and maintenance of a telegraph or telephone line upon a highway is a new and additional burden upon the fee, to which, when the highway was established, it was not contemplated it would be subjected, and for which the owner is entitled to additional compensation.

2. SAME—REMOVAL—EQUITY.

When a telegraph or telephone company proceeds to construct its line and erect poles upon the highway during the pendency of an action to enjoin them from so doing against the objection of the owner and without first acquiring the right to do so by contract with the owner or otherwise, a court of equity will order the same removed.

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3. INJUNCTION THE PROPER REMEDY—ACTION AT LAW.

- Injunction is the proper remedy for the abutting owner on a highway or against a telegraph or telephone company, which attempts to construct its line on the highway without obtaining his consent or otherwise acquiring the right to do so, and the abutting owner's right thereto is not defeated by a right of action to sue for the amount claimed as damages.

BROWN, J.

This case comes before the court for hearing upon the petition, the amended petition, the second amended petition and the answer. The petition avers that the defendant is a corporation duly organized, having no fixed place of business in Clinton county, Ohio, and that the defendant, John A. McDowell, is its agent and superintendent of its workmen; that the defendant company is engaged in the construction of a telephone line from Washington C. H., Ohio, to Wilmington in Clinton county, Ohio, which telephone line passes through and upon the real estate belonging to the plaintiff.

The amended petition sets out a full and complete description of the plaintiff's real estate, and in the original petition avers that the defendant has entered upon the said lands with its workmen without the consent of plaintiff and without first having obtained the right so to do by proper condemnation proceedings and are now proceeding to dig up the earth, plant its poles and string its wires and to appropriate to itself a right of way across said plaintiff's said lands without plaintiff's consent and without paying any compensation therefor; that the defendants in disregard of the rights of plaintiff have violently entered upon said lands upon Sunday, have taken forcible possession and are now proceeding to appropriate to its own use a right of way acrosss the same as above stated, without paying any compensation whatever therefor, and against the will and protests of the plaintiff and unless restrained forthwith by the orders of this court, will continue so to do, and will appropriate said right of way as aforesaid; that the defendant, John A. McDowell, is the agent in charge of the workmen. And, therefore, the plaintiff asks for a temporary injunction enjoining them from entering upon the premises and digging up the earth and planting its poles and stretching its wires, as it is now attempting to do, and that upon final hearing the injunction may be made perpetual.

Upon this petition being filed, on Sunday, May 6, in chambers, Judge Savage allowed a temporary restraining order. On May 8, the plaintiff filed an amendment to her petition alleging that the defendants, for the express purpose of evading the judgment and avoiding the process of the court and for the purpose of obtaining and holding a right of way for said telephone on and over plaintiff's premises, without paying compensation therefor, or paying damages to the premises thereby occasioned, selected Sunday, May 6, for the work, commencing about the hour of three o'clock in the morning, intending to complete said work over plaintiff's premises before the end of that day, with the pretense

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and claim that the plaintiff would be deprived of all legal redress because said day was Sunday. The plaintiff avers that the defendants have forcibly and violently entered upon the premises and taken possession of the same on said day and are proceeding to appropriate plaintiff's property by force and violence to their own use, alleging and claiming that the plaintiff is powerless to prevent the same by any process of court because the work was being done on Sunday.

She further avers that in constructing said line over said premises, defendants are cutting, mutilating and destroying plaintiff's shade and ornamental trees, located on and near said right of way sought to be appropriated; that the defendant, the said company, has taken no steps or measures to have the compensation and damages for said right of way estimated and assessed in pursuance of law, but is seeking by force to obtain same without paying compensation, and unless the said company and its agents are restrained, the company will accomplish its purpose, and prays as in the original petition.

On May 14, the defendants filed an answer to the petition as amended, admitting that it is a corporation under the laws of the state of Ohio, that McDowell is its superintendent of workmen in Clinton county; that it is engaged in the construction of a telephone line from Washington C. H., Ohio, to Wilmington, Ohio, but denies that it is constructing said telephone line upon or through the premises of plaintiff, but on the contrary it alleges that such telephone line is being constructed along and upon the north side of a certain public highway leading from Washington C. H., Ohio, to Wilmington in Clinton county, Ohio, known as the Washington and Wilmington Free Turnpike, and denies each and every other allegation in the petition contained.

Upon the hearing, the plaintiff established by the weight of the evidence that she was the owner of the premises described in the petition and that her line extended to the middle of the turnpike, and that the defendant was guilty of the acts charged in the petition. The undisputed testimony of M. R. Denver, the son of the plaintiff, is that he was the agent of the plaintiff in all matters relating to the farm and particularly in this matter, that negotiations had been carried on between the parties in regard to the compensation and damages, that the defendant company had offered one dollar a pole, there being in all about fifty poles, and that he had asked for one hundred dollars, and that being unable to agree upon the amount, negotiations ceased and that shortly after the acts were done as alleged in the petition.

The defendant McDowell testified that as superintendent of the workmen constructing the line, he had thought that the injunction issued on Sunday was not valid and therefore had returned with his workmen, as he says on his own responsibility, early Tuesday morning, May 8 and dug holes for the poles about one hundred feet apart, placed poles in

every other hole, cut the limbs of some of the trees and strung the wires virtually as set out in the amendment to the petition.

The question as to the issuing of the temporary restraining order on Sunday was passed upon by Judge Savage and sustained, and of course it is not necessary to consider this nor was that considered upon the hearing.

Article 1 of the bill of rights in the constitution of 1851, sec. 19, provides that private property shall ever be held inviolate but subservient to the public welfare and when taken in the public exigency, compensation shall be made the owner in money without deduction for benefits and such compensation shall be assessed by a jury.

Section 5, art. 13, provides that no right of way shall be appropriated to the use of any corporation until full compensation therefor be first made in money to the owner irrespective of any benefit, which compensation shall be ascertained by a jury of twelve men.

It has been distinctly held in Crawford v. Village of Delaware, 7 Ohio St., 469, that the easement of the abutting land owner in the highway is as much property as the land itself. This principal was clearly stated in Lessee of Irvin v. Smith, 18 Ohio St., 229; Street Ry. v. Cumminsville, 14 Ohio St., 523, and in Bowles v. State, 88 Ohio St., 41.

In this case the plaintiff is the owner of the fee to the middle of the highway and this fee is subject to the public rights in said highway for the public convenience.

Sections 3454 to 3470, Rev. Stat., inclusive, provide that magnetic telegraph companies may construct telegraph lines upon any public road in this state subject to certain conditions.

Section 3456 provides that such company may appropriate of the lands so much as may be deemed necessary for the erection and maintenance of its line.

Section 3457 provides that no such company shall, without the consent of the owner in writing, erect any pole or other fixtures so near to any edifice as to occasion injury thereto or risk of injury, in case such pole or fixture be overthrown, nor can it injure any fruit or ornamental trees.

Section 3471 makes the provisions of this chapter as to magnetic telegraph companies apply to telephone companies.

Section 5263 and subsequent sections of the revised statutes of the United States, Title LXV, provide that any telegraph company may construct, maintain and operate its line of telegraph through and over any portion of the public highway or domain of the United States, but such lines shall be so constructed and maintained as not to obstruct or interfere with the ordinary travel on such roads. It further provides for the written acceptance of the provisions of this chapter to be filed with the postmaster general. These sections are also made applicable to telephone companies.

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In commenting upon these sections in *Daily v. State*, 51 Ohio St., 348, Judge Spear, on page 356, says : "But the statute nowhere undertakes to deal with the private right of ownership in the highways, and the question arises whether it was the legislative purpose to give rights to telephone companies inconsistent with the rights of the owners of adjoining lands in the highways. Whatever may be the rule in other states, we have supposed that the question of the right in the highway of a land owner, whose title extends to the center of the road, is not an open one in Ohio. The question has been the subject of adjudication in a score of cases decided by this court." And cites *Nash v. Atherton*, 9 Ohio St., 167; *State v. Medbury*, 7 Ohio St., 459; *Cincinnati & S. G. Ave. St., Ry. Co. v. Cummins*ville, 14 Ohio St., 523; *Hatch v. Railroad Co.* 18 Ohio St., v. 123, and others, and quotes from *Lawrence Railroad v. Williams*, 35 Ohio St., 16³, decision by Chief Justice Gilmore: "As between the public and the owner of land upon which a common highway is established, it is settled that the public has a right to improve and use the public highway in the manner and for the purposes contemplated at the time it was established."

On page 178, Judge Gilmore says : "The right to so divert the use and impose additional burdens on the land could only be acquired by a corporation by agreement with the owner or by appropriating and making compensation therefor in the mode prescribed by law."

Judge Spear further says in *Daily v. State*, *supra*. "That the rule of law rests upon the clear ground that the appropriation of the public highways for the purpose of telegraph lines was a new use. The highways were originally dedicated for the purposes of public travel and not for the purpose of telegraph lines, hence the new use imposed an additional burden."

The statutes of Ohio grant to telegraph and telephone companies subordinate rights which is apparent from the provision that lines are to be constructed so as not to interfere with the public use of the highway. Judge Spear says further : "The question of legislative power therefore to authorize a telegraph company to take the interest of the adjoining land owner in the highway without compensation, need not be considered.

"It follows that before the telegraph company could possess a right in such measure as to interfere with the right of the land owner in the highway, it would be required to acquire that right in some one of the ways known to the law.

"The mere acceptance of the United States statutes by a telegraph or telephone company as required by the United States statutes does not thereby acquire any right as against the individual property right of the land owner."

In *Pensacola Tel. Co. v. W. U. T. Co.*, 96 U. S. 1, Chief Justice Waite in rendering the decision, in commenting upon this statute with regard to the rights of two telegraph companies under the United States

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statutes, was so careful that that decision should not give any unwarranted authority, said: "It gives no foreign corporation the right to enter upon private property without the consent of the owner and that whenever the consent of the owner is obtained, no state's legislation should prevent the occupation of roads for telegraph purposes." He further says that if private property is acquired, it must so far as the present legislation is concerned be obtained by private arrangement with the owner, no compulsory proceedings are authorized, only national privileges are granted.

In *Daily v. State*, *supra*, it was held that the owner of the adjoining land was the owner of the trees along the highway and had the right to their full enjoyment subject only to the convenience of the public welfare.

The case of *Smith v. Telegraph Co.*, 1 Circ. Dec., 475, decided by the judges in the seventh circuit, Judge Woodbury rendering the decision, is the most fully and ably considered of any case upon this subject and is in almost every particular similar to the case in dispute. Judge Woodbury has carefully considered all the cases upon this subject in nearly every state in the Union and in the Supreme Court of the United States, and comments upon the different phases of the matter, and the court holds that the construction and maintenance of a telegraph or telephone line upon a highway is a new and additional burden upon the fee, to which when the highway was established it was not contemplated it would be subjected and for which the owner is entitled to additional compensation. When such company proceed to construct such line upon the highway during the pendency of an action to enjoin them from so doing against the objection of the owner and without first acquiring the right so to do by contract with the owner or otherwise, a court of equity will order the same removed.

I will not go into the details of this decision which is convenient to all the members of the bar, but to decide otherwise than this court it would be like overruling the circuit court.

It is contended that injunction is not the proper remedy, that the plaintiff had an adequate remedy in law in suing for the one hundred dollars which she had agreed to take, but this position is not sustained by the decisions. This was the private property of the plaintiff. She had a right under the constitution and laws of the state to compensation and for damages, and when her rights were interfered with, her proper remedy was by injunction, as clearly held in the above cited cases.

In *Atlantic & G. W. Ry. Co. v. Robbins*, 35 Ohio St., 531, it was held that the owner of land which had been unlawfully taken and appropriated by a corporation to its use, could not maintain an action for the value of the land so taken and also damages accruing by reason of such taking, if the circumstances were such that he may recover the land itself.

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A decree for the plaintiff will therefore be entered, but sixty days time will be allowed to the company as reasonable opportunity to acquire this right to maintain a line upon the property of the plaintiff; if not acquired within that time, the company will remove its line.

Mills & Clevenger, for plaintiff.

Thorpe & Miller, for defendants.

WILLS—ESTATES—TRUSTS.

[Montgomery Common Pleas, 1900.]

(Transferred by statute from Superior Court.)

ISAAC H. KIERSTED ET AL. V. JAMES MANNING SMITH ET AL.

1. WILLS—RULES FOR CONSTRUCTION.

In the construction of a will, the rules that "the intention of the testator must control;" "words should be used in their ordinary and usual significance;" "the whole will should be construed as a whole;" "equitable words should be given their technical meaning;" "the law favors the vesting of estates;" are subject to the application of the broader rule that the clear meaning of the will, showing the clear intent of the testator must not be negatived or set aside.

2. WILLS—LIFE ESTATE—FEE SIMPLE.

A will devising property to a trustee to be held in trust for the benefit of testator's two daughters, to be "set off" to them or either of them by the trustees on their arrival at age, but to be still held in trust to their arrival at age, "and said partition between them," the rents and profits only to be paid to them or either of them, according to their respective shares, during their lives, with the fee simple to the heirs of said daughters "to be divided equally as above," gives to the daughter a life estate only and not a fee simple.

3. WORDS USUALLY APPLIED TO FEE SIMPLE ESTATES CONSTRUED.

Where a will provided that the residue of testator's estate should be held in trust for his daughters, to be "set off" to them by trustees on their arrival at age, but to be still held in trust after their arrival at age and "partition" between them, the words "set off" and "partition," as against the provisions referred to in a preceding paragraph, are not to be construed to mean a division of a fee simple or inheritable estate.

4. CONSTRUCTION OF THE WORD "HEIRS."

Where the language of a will clearly indicates the intention of the testator to give a life estate to his daughters, and the fee simple in remainder to their heirs, such intention cannot be defeated by a construction as to the sense in which the word "heir" is used. The expressed intent of the testator, not the mere implication should fix the meaning of the word "heir."

5. CONSTRUCTION OF SEC. 5970, REV. STAT.

Section 5970, Rev. Stat., providing that every devise of lands, etc., in any will hereafter made, shall be construed to convey all the estate of the devisor therein which he could lawfully devise, unless it shall clearly appear by the will that the devisor intended to convey a less estate, does not necessarily mean that the whole estate must be devised to the first taken, unless the intention of the testator is clearly shown, nor does it require each item of the will to show the testator's intention, if the intention as to the several items can be devised from the whole will.

6. WILLS—INTENTION OF TESTATOR TO GOVERN.

The rule that such a construction will be favored as will contribute to the immediate vesting of an estate will not be applied so as to defeat the intention of the testator.

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7. RULE IN SHELLEY'S CASE ABROGATED AS TO WILLS.

The rule in Shelley's case as applied to wills was abrogated by statute in Ohio, in 1840, cannot, therefore, be appealed to assist in ascertaining the intention of the testator in the construction of a will.

8. FORMER CONSTRUCTIONS SHOULD BE FOLLOWED.

Unless some positive rule of law or enactments of statutes should require it, a will should be construed so as to follow former constructions by courts and interested parties in the administration of the estate.

9. RIGHT OF HEIRS TO OBJECT TO TERMINATION OF TRUST.

Heirs presumptive or apparent who have not a vested estate in trust property have a right to object to the termination of a trust created by a will, which will cut them out of the rights accruing to them should the trust be continued according to the terms of the will.

10. TERMINATION OF TRUSTS.

A trust created by a will in property cannot be terminated with the consent of the beneficiaries, if such termination will destroy the rights other parties would eventually have in the trust property, should the trust be continued under the terms of the will.

BROWN, J.

In the matter of the trusteeship under the will of George W. Smith, deceased, Isaac H. Kiersted, trustee.

The trustee filed a final report April 11, 1900, in which he charges himself with the principal fund of \$24,085.05, and asks credit for \$6,125.65, leaving the balance of the principal fund \$14,430.27. The trustee states that the purposes of his trust have been fully performed, and that the *cestuis que trust*, Sophia C. Kiersted and Louise M. Fletcher, are both desirous that the trust be terminated, that each receive their respective interest, and are now in full possession of the *corpus* of said trust, and asks for a termination of the trusteeship.

Exceptions to this final report and account are filed by Lida Manning Smith and George W. Smith. Miss Smith states that she is the daughter and only heir-at-law of James Manning Smith, a defendant in this cause, who was a son of George W. Smith, and a brother of Sophia C. Kiersted and Louise M. Fletcher, for whom a trust was created by the terms of the last will and testament of said George W. Smith, deceased.

Item 10 of said will provides as follows:

"The residue of my real estate and turnpike stocks I declare to be held in trust for the benefit of my two daughters, Sophia and Louise, to be set off to them or either of them by my trustees on their arrival at age. But to be still held in trust after their arrival at age and said partition between them, the rents and profits only to be paid to them or either of them according to their respective shares during their lives with the fee simple to the heirs of said daughters to be divided equally as above."

A trust fund was created by the sales of certain property in this cause, and a trustee appointed, Mr. Kiersted being the last one. The

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fund was managed satisfactorily, and there are no exceptions to the formal accounting. Mr. Kiersted was appointed April 8, 1884.

After the death of the testator, George W. Smith, a daughter was born to him, who, under the terms of the will, became entitled to participate in the trust. This daughter, Mrs. Annie E. Sheeley, died in 1898, without children, having received the income during her life, and her interest in the principal fund was divided among her heirs, agreeable to the terms of said George W. Smith's will, James Manning Smith, the father of Miss Smith, receiving his proper share.

Miss Smith avers that Sophia C. Kiersted is past seventy years of age, a widow, and has no children of her own; that Louise M. Fletcher is more than sixty years of age, has no children, and that in the event of their dying without children, in case Miss Smith survives, that she will be one of the heirs-at-law of such decedent, and entitled to a share in the principal of the trust fund. She avers that neither Mrs. Kiersted nor Mrs. Fletcher are entitled to receive any portion of the principal, their rights being confined solely to the income during life, that the principal of the fund does not vest or become payable until after the death of said parties, and then to such persons as shall then be the heirs-at-law of such decedents. She therefore asks that the court appoint a trustee in the place of Isaac H. Kiersted, deceased, and that the court do not confirm the report of the trustee distributing the fund, and that in case the fund has been paid over, that the court order a repayment of same to the new trustee, and for such action as may be necessary in the premises.

George W. Smith, who is the son of George W. Smith, and a brother of Mrs. Kiersted and Mrs. Fletcher, also files similar exceptions, and says that in case of the death of Mrs. Kiersted and Mrs. Fletcher without children, in the event he survives, that he will be one of the heirs-at-law of such decedent or decedents, and as such entitled to a share of the principal trust fund mentioned in the exceptions.

A hearing was had upon these exceptions, and the matter argued orally and submitted on briefs.

Mrs. Sheely left a will, naming a sole legatee and devisee, but her share of the trust fund was paid to her heirs under the will of George W. Smith, deceased, and not to the legatee under the will although her will is recorded in this county.

Since the hearing, Mrs. Fletcher has made a statement in writing that she will not consent to a termination of the trust, and wants it distinctly understood that she desires a trustee to be appointed for her benefit, as directed by the will of her father.

It is contended on the part of counsel for the trustee that the proper construction of the will of George W. Smith, would give to his daughters the entire estate; that the intention of the testator, as gathered

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from the whole instrument must control, when not in conflict with the law or against public policy, and that the words used in the will are in their ordinary and legal signification, unless it is manifest from the context or other provisions in the will that the testator used them in a different sense, and that the word "heirs" is to be gathered from the intent of the testator, and that the presumption is that the word is used as a word of limitation, that under Sec. 5970, Rev. Stat., which provides that every devise of lands, tenements or hereditaments in any will hereafter made shall be construed to convey all the estate of the devisor therein which he could legally devise, unless it should clearly appear by the will that the devisor intended to convey a less estate; that it does not clearly appear by the will of George W. Smith that he intended to convey less than the entire estate to his daughters; that he had in mind the intent to give his daughters the entire estate.

First—Because he gives them the "rents and profits;"

Second—Because the property is to be "set off" to them upon their arrival at age.

Third—Because they "shall receive" their equal share of land; and

Fourth—Because Sophia may leave her share.

For the first three causes, it depends upon Sec. 5970, Rev. Stat., quoted above, and upon the case of *Allen v. Henderson*, 49 Pa. St., 333. In this case a testator devised to his daughter, then and at the time of his death unmarried, certain real estate, in trust for her heirs until they are twenty-one years old, until which time she to have the income for the support of her heirs, and should she die leaving no heirs, the property was to revert to her brothers or their heirs. It was held that the word "heirs" was to be construed as a word of limitation and not of purchase, and that the failure of heirs contemplated in the devise over, an indefinite failure, that the devise in trust for the issue of her body with a devise over limited upon an indefinite failure of issue, created an estate tail, if any interest vested in her, and that the grant of the income did pass the estate, and therefore that the trust failed, and the devisee took an estate in fee tail, which, by an act of the Pennsylvania legislature in 1855 became enlarged into a fee simple.

The fourth clause, referring to Sophia's authority to "leave her share" refers to the last part of Item 10 of the will, which provides "Sophia may if she please leave her share in the general estate until James would arrive at age if he so long lived, and thus have the benefit of the wild land investment up to that time, or his death if it should happen before he arrived at age, said lands for the daughters to be held under the trust aforesaid, profits to them for life, fee simple to heirs."

Item 11 provides, "It shall be within the power of the trustees to sell and convey the wild lands belonging to a daughter after she arrives at age in order at their discretion or by her request to place it in other

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secure property, the profits of which shall be paid to her and fee for her heirs."

Counsel further claims that the intention of the testator being thus determined, was to give his daughters the entire estate, and that the law fixes the nature and quantity of the estate.

First: That if the word "heirs" is used as a word of limitation, the daughters take a fee simple absolute;

Second: That the rule in Shelley's case is a rule of property, not a rule of construction; and

Third: That the estate for life created in the devisee or donee is limited precisely as it would descend at law.

The rule in Shelley's case vests the entire fee in the first devisee or or donee.

Prominent lawyers, including Hon. Peter Odlin and Judge Haynes, have been connected with this trust.

Among other letters introduced in evidence, there was one from Mr. Kiersted, the trustee, in which he says that he had advised with Judge Haynes about the distribution, and that he had made it out in accordance with his advice, that the income on two-thirds of the estate would not go to Mrs. Kiersted and Mrs. Fletcher and then to the survivor, and after them to George, as next of kin. He adds that he leaves that to the future, as he does not pretend to be a lawyer; but this makes the opinion of Judge Haynes in this matter important, as the opinion of one of the most eminent jurists that has ever been at our bar.

Counsel for the trustee bases his case entirely upon the legal effect of the word "heirs" in Item 10. He claims that this word is used as a word of limitation, and hence that Mrs. Kiersted and Mrs. Fletcher were the sole beneficiaries, and that the trust would be lawfully terminated by the act of the trustee conjointly with the consents of these two beneficiaries, but he concedes that if the word "heir" is used as a word of purchase, then the exceptions are well taken.

What estate did the will give to the daughters?

The intention of the testator must control, and words should be used in their ordinary and usual signification; the whole will should be construed as a whole; equitable words should be given their technical meaning; the law favors the vesting of estates. All these rules are subject to the application of the broader rule that the clear meaning of the will, showing the clear intent of the testator, must not be negatived or set aside.

In the first place, the will gives the entire estate to trustees. He then defines the nature of the trust. The family is to have a home, free of charge, during the life of the widow. (Item 3) Trustees are to give the children an education. (Item 4) As each child becomes of age its rights to the provision made for all in common is to cease. (Item 3) Each is then to have its own source of income. A distinction is drawn

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between the boys and the girls. When the boys become of age they are to acquire title to the property provided for them in fee simple. But as to the girls, the testator is equally clear in stating that they are to have not a fee simple, but a life estate only.

He expressly provides that the property of the daughters is "to be still held in trust after their arrival at age." He provides for no conveyance to them of the legal title at any time, but adds "the rents and profits only to be paid them or either of them during their lives," (Item 10) the word "only" in the above sentence adding additional emphasis.

He leaves nothing to inference. He carries in his mind continuously the distinction intended between the provisions for the boys and that for the girls. At the end of Item 10 he adds the words, "during their lives with the fee simple to the heirs of said daughters to be divided equally."

The words "set off" and "partition" used in the will, are claimed by counsel for the trustee as words showing that the daughters were to have the fee simple on arrival at age.

Is this not a strained conclusion?

Even if used technically, it is not such as to justify such conclusion. It provides that the residue of his estate shall be held in trust for his daughters, to be set off to them by trustees on their arrival at age, but to be still held in trust after their arrival at age and said partition between them.

The property could not remain in trust without the trustees continuing to hold the legal title, which was such a setting off as the testator clearly intended.

The words could not possibly have the significance claimed. A partition does not necessarily mean a division of a fee simple or inheritable estate.

Item 16 provides for the appointment of successors of the trustees of this trust. "These appointments shall be evidenced by the written appointment filed in the clerk's office where this will may be proved, as also all partitions, appraisements, etc., made under this will."

Conveyances in fee simple are filed in the recorder's office.

The word "receive" in Item 10. Counsel claims that the use of this word makes it conclusively follow that under sec. 5970, Rev. Stat., the daughters were given the entire estate.

This section provides that every devise of lands, tenements or hereditaments in any will hereafter made shall be construed to convey all the estate of the devisor therein which he could lawfully devise, unless it shall clearly appear by the will that the devisor intended to convey a less estate.

The last clause of this section clearly shows that the section does not necessarily mean that the whole estate must be devised to the first taker, unless the intention of the testator is clearly shown.

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It does not require Item 10 alone to show the testator's intention. The idea runs through the whole will, and is consistent with every part of it. Item 11, for instance, provides that it shall be within the power of the trustees to sell and convey the wild lands belonging to a daughter after she arrives at age, so as to place it in other secure property, the the income and profits of which shall be paid to her and fee to her heirs.

If the daughters are to receive each her whole share in fee, how could the trustees sell it, if the daughters had acquired a fee simple? This seems to show the sense in which the testator used the words "to set off to them" in Item 10. He regards the share of each as "belonging to the daughter" in the sense intended by him, although the trustees held the title, so that the daughters should receive the net income, with fee to their heirs.

Item 12 gives the trustees the management and control of the property "committed to their trust" in addition to the legal estate in them as trustees.

Item 18 provides for a readjustment in case of a death before age, but it expressly provides that "any amount of property taken by a daughter under this clause shall remain and vest in said trustees for her use for life and to her heirs in fee simple."

Unless some positive rule of law or enactments of statutes should require it, the court should construe this will so as to follow former constructions by courts and interested parties in the administration of an estate.

It is now over sixty years since the administration of this estate began. When the sons became of age their shares were conveyed to them in fee simple. When the daughters became of age, the title remained in the trustees.

In 1863, five years after the last daughter became of age, the real estate held in trust for the daughters was sold as entailed real estate, under sec. 5803, Rev. Stat. and the following sections. The property was converted into money, the trustee appointed under sec. 5809, and the fund has ever since remained subject to the jurisdiction of this court.

If the trustees and daughters themselves together own the entire legal and beneficial estate, this proceeding was entirely unnecessary. The same purpose could have been accomplished by joining in a deed and the proceeds divided at once.

Henry Stoddard, Esq., who drew the will, did not die until 1871; Judge Haynes was on the bench when the suit was brought, and subsequently advised the trustee, and one of the ablest lawyers at the bar, Hon. Peter Odlin, acted as one of the trustees. All these eminent men evidently agreed as to the correctness of the construction contended for on the part of the exceptors herein.

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A very important matter in this connection is the fact that under the advice of Judge Haynes, the share of Mrs. Ann Sheely, who died without issue, her husband surviving her, was divided between Mrs. Kiersted, Mrs. Fletcher, James Manning Smith and George W. Smith, each of them receiving one-fourth. The trustee who now attempts to terminate the trust made this division. This was distributed as the estate of the testator George W. Smith under this will. If it had been distributed as Mrs. Sheely's property, it must first have gone to her executor, as she left a will.

The court, being satisfied from the language of the will, that the testator intended to give a life estate to his daughters, and the fee simple in remainder to their heirs, there is nothing in the way in which the word "heirs" as used, that will in law defeat this intention.

As to the application of the rule of Shelley's case, it is very true it had been decided in King v. Beck, 15 Ohio, 562, that it is not a rule of construction, but a rule of property, but Judge Read in that decision says the testator may use the word "heir," and take it without its usual legal sense, if he employ words respecting it to show that he did not use it in its ordinary legal sense, or if the plain intention manifested in the will shows that it was not employed in its usual legal sense, but with words of explanation showing the manifest intent of the testator, it can be made a word of purchase. If, where the word "heir" is used, there be superadded word of limitation, establishing a new succession, the first donee or devisee would take but a life estate.

The expressed intent then, of the testator, will fix the meaning of the word "heir." It is said a mere implication will not.

The rule in Shelley's case has been very fully investigated and commented upon since the submission of this case, by Judge Pugh in the Franklin county common pleas, in the case of Hess v. Lakin, 7 Dec., 300. This case arose under a deed.

The rule in Shelley's case as applied to wills was abrogated by statute in Ohio, in 1840. Trustees v. Thoman et al. 51 Ohio St., 297, Sec., 5968, Rev. Stat.

Even before the passage of this statute, it was held inapplicable to defeat the clearly expressed intention of the testator, as stated in King v. Beck, supra. The rule cannot be appealed to assist in ascertaining the intention. To say that the rule in Shelley's case as a rule of property will still be applied in case the court finds the testator used the word "heirs" as a word of limitation, is only to show in another form that the testator's intention will govern.

The rule as to the vesting of estates yields to the intention in the same way.

The rule that such a construction will be favored as will contribute to the immediate vesting of an estate will not be applied so as to defeat

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the intention of the testator. Baldwin, Admr. v. Humphrey, 2 Circ. Dec., 417.

The heirs of these daughters take a contingent remainder. The word "heirs," was manifestly not used in the sense of children. The daughters were quite young and had no children, nor have they yet. There was no one in whom the estate could vest, nor will there be until their deaths. This being so, it is impossible to terminate the trust during these daughter's lives, because there is no one to consent on behalf of the remainder-men.

The exceptors herein have not a vested estate, it is true, but, as next of kin, they are heirs presumptive or apparent, and have rights which the law ought to protect.

Isaac H. Kiersted was a trustee under this will, and as such an officer of this court, appointed for a specific and continuing purpose. Sec. 5809, Rev. Stat.

And had no right or authority to terminate this trust with the consent of Mrs. Kiersted and Mrs. Fletcher, and especially was he not authorized, as Mrs. Fletcher does not consent, and so states in writing.

It is therefore the finding of this court that the exceptions be sustained and a new trustee appointed, to whom the balance of the funds to-wit, \$14,430.27, will be given in trust, upon his qualifying and giving bond in the sum of \$30,000.

Young & Young, for Exceptors.

Murat W. Hopkins, of Indianapolis for Trustee.

COSTS IN CRIMINAL CASES.

[Clinton Common Pleas, July, 1900.]

JOHN C. MARTIN V. CLINTON CO.

STENOGRAPHER'S FEES FOR MAKING TRANSCRIPT—COSTS.

A defendant in a criminal case, whose conviction in the court of common pleas was reversed by the circuit court, is entitled to recover of the county, as costs, fees which he was required to pay to the official stenographer for a transcript of the evidence on the trial in common pleas, in order to secure same in time to get his case into the circuit court.

BROWN, J.

This matter comes before the court upon an appeal from the county commissioners under sec. 696, Rev. Stat., and was heard upon the testimony and was argued by counsel fully, both orally and by brief.

The testimony shows that John C. Martin was on trial at the January term, 1898, of the court of common pleas of Clinton county, Ohio, under an indictment found by the grand jury of that county.

The journal shows: that on January 24 an official stenographer was appointed to report the testimony in the case; on February 28, on

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application of the state and of the defendant, the official stenographer was directed to make such transcripts which are ordered by the counsel or court; on February 28, that Matt. J. Day was appointed additional and assistant official stenographer in the case, he was duly sworn and entered upon his duties.

It further appears from the testimony that the stenographer was unable to transcribe between the sessions of court all the testimony which had been taken during the trial, although it appears clearly that the stenographer was ordered to make complete transcripts of all the testimony by counsel for the defendant, and only about one-fourth in amount of the testimony was actually transcribed before the verdict, which was guilty on one of the charges included in the indictment.

After a motion for a new trial was overruled, the time was very short within which to prepare a bill of exceptions with a complete transcript of the testimony. The stenographer declined to make this transcript upon the request of the defendant and his counsel until he was paid for the same, and stated that he desired no controversy with the commissioners with regard to his fees as it would be necessary for him to employ a number of assistants, but that he would give the necessary receipts which would entitle him to recover the amount back from the county commissioners.

The original cost bill in the circuit court shows that the costs of the defendant including this transcript, which is marked "paid by the plaintiff in error" is \$744.41. The journal of the circuit court of March 30, 1899, shows that the judgment of the common pleas court was reversed and a new trial awarded to the plaintiff in error "and that he be restored to all things he has lost by such erroneous conviction and he recover of this defendant in error his costs herein expended taxed at \$——."

A change of venue was then had in this case to Greene county and a certified copy of that court dated March 18, 1900, shows that the defendant John C. Martin was found not guilty under that indictment.

Mr. Martin presented a bill for the amount actually expended by him for the transcript made by the stenographer \$675.00 and the clerk's transcript of entries \$38.25, total \$713.25, which was unanimously rejected by the board of county commissioners and an appeal was taken to this court as heretofore stated.

Section 1318, Rev. Stat., provides that in all actions, motions and proceedings in any of the courts of this state, the costs of the parties shall be taxed and entered of record separately, and sec. 1319 provides that on rendition of a judgment in any case, the costs of the party recovering * * * shall be carried into his judgment. And sec. 1322 provides that in all cases taken from the court of common pleas to the circuit court on error or appeal * * * the clerk shall certify in the mandate of execution the costs of the losing party.

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These sections apply to both civil and criminal suits and this is the practice in our courts. The amounts paid for these transcripts were first paid to officers of the court whose compensation is fixed by law and was properly taxed in the costs and was recovered by the judgment of the circuit court.

Section 478, Rev. Stat., provides for the appointment of stenographers and the payment of their fees, and the court, in making the appointment in this case, followed the statute closely. Section 479 provides that when shorthand notes have been taken in any cause, if the court or either party to the suit or his attorney requests a transcript of these notes, the official stenographer shall make full and accurate transcripts, which shall be filed by the clerk of the court for the use of the court or parties.

Section 480, Rev. Stat., provides that the fees for such transcripts shall be eight cents per folio of one hundred words and shall be paid forthwith by the party or parties for whose benefit the same is ordered and when paid shall be taxed as other costs in the case; but all transcripts made in criminal cases * * * shall be paid out of the county treasury in the manner provided for the payment of fees for taking shorthand notes, evidently referring to sec. 478.

I am in some doubt as to whether the order of court in the journal entry which ordered that the stenographer should make such transcripts ordered by the counsel or court, would be sufficient to cover transcripts not actually made during the trial or transcripts ordered by counsel after the trial, but I am inclined to the opinion that transcripts of the testimony under the order similar to that made in this case and completed for counsel after the trial, ought to be paid by the county, and in this case it was clearly a necessary part of the costs and could have been recovered by the stenographer, had it not been advanced by the defendant for the transcript of the testimony to make the bill of exceptions, and was properly taxed in the costs, and paid by the defendant in order to get his case into the circuit court. All costs are supposed to be actually advanced and paid at the time the costs are incurred and the court and the law so treat these costs although this is not the actual practice, and upon a reversal of the case, whether criminal or civil, the plaintiff in error is entitled to recover his costs expended, as was done in this case.

In McCourt v. Commissioners, 00 Dec., 000, which is also reported in the 5 Court Index, 14, is a case in which John McCourt had paid \$675.00 to the official stenographer for a transcript of the testimony in a criminal case, No. 11921, in which McCourt had been convicted under an indictment and which conviction was reversed by the circuit court, case No. 2028, circuit court of Hamilton county. Judge Moses Wilson held upon a similar proceeding in an appeal from the board of county commissioners made by McCourt to the court of common pleas, that McCourt

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was entitled to recover and the auditor of the county was directed to issue his warrant upon the treasury of the county for the amount. And the practice has been followed by the courts of Hamilton county since then.

It therefore becomes the duty of this court to reverse the action of the county commissioners and direct that the auditor of Clinton county draw his warrant upon the treasury of said county for said amount of \$718.25.

Thorpe & Miller, for county.

Major Hayes, for plaintiff.

PLEADING.

[Hamilton Common Pleas, 1900.]

MONTGOMERY & AULL v. W. W. THOMAS ET AL.

DEMURRER—WAIVER OF RIGHT TO FILE MOTION.

The filing and determination of a demurrer to a pleading on the ground of insufficiency, is a waiver of the right to file a motion to strike out from such pleading or to make the same definite and certain.

PFLEGER, J.

The defendant, Watters, filed a demurrer to the petition on the ground that the same did not state facts sufficient to constitute a cause of action. The demurrer was overruled and leave given to plead. Thereupon Watters asked leave to file a motion to make the petition definite and certain and to strike out certain parts thereof.

Plaintiff's counsel cited *Caldwell v. Brown*, 6 Circ. Dec., 694; *Fritz v. Grosnicklaus*, 20 Neb., 418, and *Savage v. Chalis*, 4 Kan., 279, against the right so to do.

Defendants' counsel cited *Chalis v. Commissioners*, 15 Kan., 569, in support of such right.

Counsel have expressed a difficulty in finding authorities on this question. By some research a number may be found.

Section 5113, Rev. Stat., authorizes a party to answer or reply after a demurrer is overruled if the court is satisfied that he has a meritorious claim and did not demur for delay.

The overruling of a demurrer to a petition would preclude the defendants from taking advantage of defects in the petition by a motion thereafter filed. *Caldwell v. Brown*, *supra*. The practice of filing a demurrer and a motion can not be permitted. *Wyman v. Hayes*, 1 Cler., 179. It is not good practice so to do. *Gibson v. Ohio Farnia Co.*, 2 Disney, 499. The filing of a demurrer to a pleading is a waiver of the right to file a motion to make allegations of the pleading assailed more definite and certain. *Fritz v. Grosnicklaus*, *supra*. It is a waiver of the

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right to insist that the allegations of the pleading shall be definite and certain. *Van Etten v. Medland*, 53 Neb., 569.

Section 148 of Nebraska statutes, 1893, page 872, is an exact copy of sec. 5113, Rev. Stat., of Ohio.

So the mere filing of a reply is a waiver of the right to assail the answer on the ground that it is not sufficiently definite and certain. *Welsh v. Burr*, 56 Neb., 861. A motion to strike out redundant or irrelevant matter should be made at the first opportunity and before the filing of a reply. *Savage v. Chalis*, 4 Kansas, 279. Objection to redundancy, uncertainty, etc., in pleadings must be made by way of motion before demurrer or answer. *Best v. Clyde*, 86 N. C., 4; *Smith v. Summerfield*, 108 N. C., 288; *Sere v. Coit*, 5 App. Pr., 482; *Pugh v. White*, 78 Ky., 210. A party waives the error to the overruling of a motion to strike out by filing a demurrer or pleading afterwards. *Baldwin v. Dougherty*, 39 Iowa, 50; *Shugart v. Peters*, 87 ib., 422; *Wattels v. Minchen*, 93 ib., 517; *Rea v. Flathers*, 81 ib., 545; 30 Ark., 684. I could find no authorities to the contrary.

In *Chalis v. Commissioners*, *supra*, fifty-three defendants first filed a demurrer to the petition and thereafter a motion to dissolve the injunction. It was claimed to be error to hear the motion to dissolve while the case stood on demurrer, but Justice Brewer held that whatever might be the rule independent of statute, the civil code of Kansas provided that such a motion could be filed at any time before the trial, and thus settled the question.

In the case at bar defendant had ample opportunity to file his motion to strike out and to make definite and certain before the filing of any pleading (and a demurrer is a pleading under sec. 5059, Rev. Stat.), without any danger to thereafter filing a pleading if he had a meritorious defense. Or, in its discretion, the court could have permitted him to withdraw his demurrer before presenting the same and to urge his motion; but, after speculating upon the decision of the court as to the sufficiency of the petition or demurrer, defendant waived his right to file either a motion to strike out from the petition or to make the same definite and certain.

Leave is therefore refused.

Sidney G. Stricker, for the motion.

Rogers Wright, contra.

INJUNCTION—CORPORATION—LAWS OF TRADE.

[Lucas Common Pleas, March 22, 1897.]

*** THOMAS J. KUHN ET AL. v. WOOLSON SPICE CO. ET AL.****1. TRUSTEE AND BENEFICIARY JOINED AS PARTIES.**

A trustee of an express trust, or a person in whose name a contract has been made for the benefit of another, may be joined with his beneficiaries as a party plaintiff in a suit to protect the rights under such contract, although by sec. 4955, Rev. Stat., he may sue without joining his beneficiaries.

2. CORPORATIONS—STOCKHOLDER—PARTIES—TRUSTS.

The registered owner of a share of stock in a corporation, which he holds as trustee for the real owner, is a proper party plaintiff under sec. 5005, Rev. Stat., in an equitable action against such corporation, the officers and directors thereof, and another corporation, for the appointment of a receiver for the first corporation, to wind up its affairs and to restrain a sale of the stock of the first corporation to the officers of the second corporation, although the real owners of such share of stock are also joined as plaintiffs.

3. ACTIONS—PLEADINGS.

A petition in an action by stockholders against a corporation to restrain it from certain acts and for the appointment of a receiver to wind up its affairs, alleging that there was no officer, director or stockholder to whom plaintiffs could go to secure redress is sufficient, without showing that a request to have their rights adjusted was first made to the corporation.

4. INJUNCTION—MOTION TO DISSOLVE—BURDEN OF PROOF.

On a motion to dissolve a preliminary injunction on the ground that the allegations of the petition are untrue, the burden is on defendants to prove that fact, but such full and positive proof is not requisite as would be necessary upon a final hearing of the case.

5. EQUITY—CORPORATIONS—MONOPOLIES—LAWS OF TRADE.

Equity will not entertain a bill by stockholders in a corporation asking for the appointment of a receiver to wind up the business of such corporation, or grant relief by injunction or otherwise, on the ground that those controlling the corporation were mismanaging it, or destroying its profits, where it appears that plaintiffs, controlling the coffee business, prepared to engage also in the sugar refining business, whereupon defendants, having a monopoly of the latter business, purchased a controlling interest in the corporation in question, which was a competitor of plaintiffs in the coffee business, and proceeded to reduce the price of coffee, with the intention of wrecking plaintiff's coffee business unless they gave up the sugar refining business, as equity will not lend its aid to one monopoly as against another, or interfere with the laws of trade, permitting one party to drive another party out of business by underselling him.

MORRIS, J.

This case has been submitted on a demurrer to the petition filed by the defendant, Lawrence Newman, and on a motion by the other defendants who are in court, to dissolve the temporary restraining order, allowed *ex parte* on a filing of the petition and affidavits in the case, and also on a motion by plaintiffs for the appointment of a receiver.

It is alleged that the defendant, the Woolson Spice Company, is an Ohio corporation; that it is engaged in selling coffee on a large scale; that its authorized capital stock is \$300,000 in three thousand shares of one hundred dollars each, of which but eighteen hundred shares have

* For decision of the circuit court in this case, see 7 Circ. Dec., 289.

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been issued and are outstanding ; that on December 1, 1896, the book value of said stock was nearly \$1,000 per share, and that said company was then conducting a prosperous and increasing business, giving a fair profit to all shareholders upon such book value of said shares ; that the plaintiff, Thomas J. Kuhn, is now and since March 23, 1896, has been the registered owner and holder of one share of stock in the Woolson Spice Company, but that the other plaintiffs have been the real owners, and since December 31, 1896, they have also been the owners of sixty shares purchased by them from J. Spence Acklin, who was theretofore the owner thereof. That the American Sugar Refining Company, defendant, is a New Jersey corporation organized for the purpose of refining and dealing in sugar, which business is carried on to such an extent and with such success that said company controls and regulates the price of sugar throughout the United States. That plaintiffs, exclusive of Thomas J. Kuhn, are partners, doing business in the state of New York, under the name of Arbuckle Brothers ; that they are engaged in roasting and selling coffee in packages on a large scale, in the same manner as the Woolson Spice Company, and with which company they have been heretofore in competition for the coffee trade of the United States. That in the early part of 1896 Arbuckle Brothers determined to engage in the business of manufacturing sugar, and about December 1, 1896, purchased land for the erection of a sugar refinery in the city of Brooklyn, which is still in the process of construction. That the carrying out of said intention would necessarily bring them in competition with the American Sugar Refining Company, in the sugar refining trade ; that the American Sugar Refining Company, having learned of said intention of the Arbuckle Brothers, for the sole purpose of inducing and forcing said Arbuckle Brothers to abandon their plan of engaging in the sugar business, determined to go into the coffee business upon a very large scale, with the intention of so thereby injuring the coffee business of Arbuckle Brothers as to compel them to give up their project of going into the sugar trade. That, to more effectually and quickly accomplish their purpose, the American Sugar Refining Company determined to, and did, December 16 and 26, 1896, purchase of certain stockholders of the Woolson Spice Company all of its outstanding stock excepting the sixty-one shares held by the plaintiffs ; that the American Sugar Refining Company was not authorized by its charter, or the laws of New Jersey or Ohio, to purchase said shares of stock of the Woolson Spice Company, and that such purchase is illegal and void. That at the time of purchasing said stock the American Sugar Refining Company, as an inducement to the sale, represented and stated to those negotiating the sale on behalf of the stockholders of the Woolson Spice Company, that after said purchaser should have accomplished the purposes for which it bought the same, to-wit, the crushing of the Arbuckle Brothers and compelling them to abandon their intention of engaging in the sugar

business in competition with the American Sugar Refining Company, the vendors of said stock would be able to repurchase the same at a much less price than they were receiving; and it is alleged that this representation was an important consideration which induced said stockholders to so sell their stock. It is alleged that the individual members of the board of directors of the Woolson Spice Company, duly elected and acting prior to said sale of stock, have sold and assigned all of their stock to the American Sugar Refining Company, have resigned, and that said corporation is now without a board of directors, proper officers, or a governing body. That, after said sale to the American Sugar Refining Company, the defendants, Alvin M. Woolson and William A. Brigham, were employed as general manager and secretary respectively, of the Woolson Spice Company; and thereafter, under directions from the American Sugar Refining Company and without the advice, counsel, or direction of any board of directors of said Woolson Spice Company, on December, 17 and 21, 1896, and January 2, and 11, 1897, reduced the selling price of coffee produced by said company, two cents a pound less than it sold for on December 16. It is charged that these reductions were not made in good faith, nor in the interests of the Woolson Spice Company or its stockholders, but solely to frustrate the plans of the Arbuckle Brothers and force them to abandon their intention of engaging in the sugar refining business. And it is alleged that the sales of coffee at the prices so fixed are now being made at an actual loss to the company and the stockholders, of from five hundred to one thousand dollars per day. That, if said prices are continued, or further reduced, as the American Sugar Refining Company threatens to do, and plaintiffs believe will be done unless this court shall come to their relief, the value of plaintiffs' stock in said company will be entirely frittered away and destroyed. That by the by-laws of the Woolson Spice Company, stock cannot be voted unless transferred thirty days before an election; and, although none of its stock has been registered, the American Sugar Refining Company threatens to, and will, unless restrained by order of court, appear at the annual meeting, January 19, 1897, by its agents, and vote as a stockholder, the 1789 shares owned by it, and elect a board of directors and through it assume the entire control of the Woolson Spice Company, without regard to the rights of plaintiffs and the other stockholders.

And it is charged that by reason of the premises, the Woolson Spice Company has been greatly damaged, and is in great danger of being wholly destroyed, to compass the ends of the American Sugar Refining Company. The plaintiffs allege that they are without adequate and complete remedy at law.

To this petition the defendant Lawrence Newman, demurs, on the ground. First that there is a misjoinder of parties plaintiff.

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Second that the petition does not state facts sufficient to constitute a cause of action.

From the petition it appears that the plaintiff, Thomas J. Kuhn, is the registered holder of one share of stock in the Woolson Spice Company, which he holds in trust for the other plaintiffs, who are the real owners. This fact is admitted on the demurrer; and as such registered stockholder, he is, in law, presumed to be interested in the success of the concern, and may bring suit to protect that stock—especially if it be true, as the demurrer also admits, that there is no president or other officers of the company to whom he can appeal to have the stock he holds transferred upon the company's books to the real owner. In view of this admission of the demurrer, and as he is liable to creditors under the laws of this state as a stockholder, he certainly has an interest in the Woolson Spice Company which he is entitled to protect, and therefore has an interest in this action; and to obtain the relief demanded, he may be joined with the other plaintiffs so interested under sec. 5005 Rev. Stat.

Again: Thomas J. Kuhn, from the allegations of the petition seems to be a trustee of an express trust, or a person in whose name a contract has been made for the benefit of another; and by the express provisions of sec. 4995 Rev. Stat., he may sue without joining his beneficiaries. The fact that they join them in the suit, does not destroy his right to stand as a party to the suit.

It would, therefore, appear that there is no misjoinder of parties plaintiff, and that the demurrer cannot be sustained on the first ground claimed.

As to the demurrer to the petition on the ground that it does not state facts sufficient to constitute a cause of action, it will be noted that on the face of the petition the plaintiffs appear only as owners of stock in the Woolson Spice Company, asking that their interests as such owners, which they allege are being imperiled, by the defendants' wrongful and unlawful acts, be protected.

It seems to me perfectly clear that the plaintiffs in this action stand only upon their rights as owners of stock in the Woolson Spice Company. There is no other interest of plaintiffs that can be considered in this case; and unless they are here for the purpose of protecting their stock and that of the other stockholders, they have no business here. No other interest is disclosed on the face of the petition.

It is charged, that with the exception of sixty-one shares of stock owned by the plaintiffs, all of the outstanding 1800 shares of stock of the Woolson Spice Company have passed into the hands and under the control of the American Sugar Refining Company, a New Jersey corporation which, it is alleged, under the laws of both Ohio and New Jersey, cannot legally hold or own said stock; that said stock was purchased by the said company for the purpose of injuring Arbuckle Brothers, and is now being used and controlled by it for the specific purpose

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of compelling Arbuckle Brothers to abandon their purpose of going into the sugar business. And it is alleged that the stock was sold to the American Sugar Refining Company to be held by it until this purpose was accomplished, when, it was understood the sellers should have the privilege of repurchasing the stock at a much less figure than was paid for it; and further: that the directors of said company have sold all of their stock, and have resigned, and that the company is without a governing body.

It is charged plainly in this petition, that the Woolson Spice Company is now, in fact, being run by the American Sugar Refining Company under its direction and control, and in such a way as to cause an actual daily loss to said company in a large amount, for the accomplishment of this ulterior purpose of the American Sugar Refining Company.

That the property of a corporation cannot be so used against the wishes of a single stockholder, is too plain for discussion. The charter of a corporation is the contract between the corporation and its stockholders; and so long as there is a stockholder opposed to a line of policy in violation of the charter of the company, he may appeal to a court of equity to restrain the company and those in charge of it, from the performance of acts which are *ultra vires* the corporation. In the management of a corporation, the directors or owners of a majority of the stock, are, in law, held to be trustees of the corporate property and assets for the benefit of all of the stockholders; and they will not be allowed to control the corporation without regard to the interests of such beneficiaries. That a minority stockholder may interfere when a good reason for interference is shown, is well established by the courts; but grievances real and substantial must exist, and before an individual stockholder can be heard, he must show that he has exhausted all means within his reach to obtain within the corporation, the relief which he desires. Beach on corporations, sec. 437.

If the facts stated in the petition are true, the plaintiffs were not required to seek relief through any one connected with the immediate management of the company. Such action would have been idle and useless; and the law will not require the doing of a vain thing. It is charged in the petition that there was no officer or director or stockholder to whom the plaintiffs could go to secure the redress to which they were entitled. The plaintiffs could, therefore, in the first instance, go into a court of equity for such relief as the law gives them.

In view of these considerations the demurrer to the petition is not well taken on the second ground claimed by the defendants, and will be overruled.

The defendants, the Woolson Spice Company, Alvin M. Woolson, William A. Brigham, John Berdan, James Secor, John B. Ketcham and Rudolph A. Bartley, being all of the defendants in the case who have been served with summons, except Lawrence Newman, have filed a

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joint answer, admitting the incorporation and business of the Woolson Spice Company as charged in the petition, the amount and value of its stock, that its business was prosperous, as claimed in the petition, that the American Sugar Refining Company is a corporation, and that plaintiffs are partners, under the name of Arbuckle Brothers, and engaged in the same business as the Woolson Spice Company; they admit that prior to the sale of stock of the Woolson Spice Company the company had a board of directors as specified; that Woolson was general manager and that Brigham was secretary; and that the Woolson Spice Company reduced the price of coffees at the times and to the extent named in the petition: that the regular annual meeting of the board of directors occurs January 19; and that a board will be elected or the present board hold over until a new one is elected: that the by-laws provide that shareholders not registered for thirty days prior to the annual meeting shall not vote; and that no stock has been registered in the name of the American Sugar Refining Company; and they deny every other allegation of the petition.

In this answer, it is specifically alleged that Arbuckle Brothers did not purchase any stock in the Woolson Spice Company in good faith, or as an investment, but for the sole purpose of maintaining a law suit against the Woolson Spice Company, putting it into the hands of a receiver, and otherwise embarrassing it in its business. They charge that the plaintiffs induced J. Spence Acklin to refuse to join his co-stockholders in the sale of the stock; that they bought their stock with their eyes open, knowing that a large majority of the shares of said company had been purchased by persons in New York who had the means and skill to increase its sales, profits and competition with Arbuckle Brothers, paying therefor thirty thousand dollars more than the other stock sold for, and forty thousand dollars more than its book value; and knowing that the Woolson Spice Company had reduced the price of coffee on December 17 and 21, 1896; and that up to that time for a long time, no one had dared reduce the price of coffee below that fixed by Arbuckle Brothers, who then and theretofore, by their control over the market, dictated the prices of coffee.

The defendants specifically deny that the members of the board of directors except Graff M. Acklin, had sold all of their stock, and aver that they are, in fact, stockholders and are still acting as directors of the Woolson Spice Company. And the defendants say that the company is not running at a loss, but that it is being operated at a profit of from five hundred to seven hundred and fifty dollars per day.

The defendants offer to give bond to plaintiffs, that the company's profits in 1897 will be as great as the average profit for any number of years to be named by the court; and say that the increase in business enables them now, and will enable them in the future to sell at a less margin of profit than when the volume of business was less; and that

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the purpose of the Woolson Spice Company is to enlarge its business until it takes the lead therein.

It is alleged also, that the defendants, Thomas J. Kuhn, is improperly joined as a plaintiff, since he has no interest in this controversy.

To this answer, the plaintiffs have filed a reply, in which they deny that they did not purchase any stock in good faith, or as an investment, or for the purposes charged in the answer; and they allege that the share of stock purchased by them March 23, 1806, and which stands in the name of Thomas J. Kuhn, who holds the same in trust for the Arbuckle Brothers, was purchased by Arbuckle Brothers in good faith, as an investment, and without any intention or expectation of using the same for maintaining a law suit against the said company, or putting it in the hands of a receiver or otherwise embarrassing its business.

They deny that they induced Acklin, from whom they purchased sixty shares of stock December 31, 1896, to refuse to join his co-stockholders and sell to the purchasers of the other stock, as charged; but they admit that the book value of said stock was nearly, but less than one thousand dollars per share. They admit that they paid Acklin for sixty shares the sum of one hundred thousand dollars, which was about thirty thousand dollars more than the highest price for which the majority of said stock was sold; and they deny that said purchase was made for the sole and only purpose of being enabled to institute litigation and annoyance against the Woolson Spice Company. Plaintiffs admit that Arbuckle Brothers purchased the said stock of Acklin, knowing that the Woolson Spice Company had reduced the price of coffee on December 17 and 21, and that the majority of the stock had been sold by the former stockholders; and they say that the intent and purpose on the part of the said Arbnckle Brothers in purchasing said stock of said Acklin, was the hope and expectation that said purchase by the said Arbuckle Brothers might operate as a restraint upon the American Sugar Refining Company and the persons or parties acting in connection with the said company and its interest, who had purchased the majority of the stock of the said the Woolson Spice Company, in carrying out their expressed design and intention of using said controlling interest in the said the Woolson Spice Company and directing the business policy of the said company in fixing prices upon its product so as to inflict such injuries upon the business of said Arbuckle Brothers as to induce and compel them to abandon their plan of engaging in the business of sugar refining, with the ultimate aim on the part of the parties so controlling the Woolson Spice Company of procuring, fostering and maintaining a monopoly of the sugar business throughout the United States. That, in the purchase of said stock, the plaintiffs intended and expected, in case the said purchase on their part should not prove effective in restraining such illegal scheme and plan on the part of the purchasers of said controlling interest in said stock, to institute an action for the purpose of protecting

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themselves against such unlawful conspiracy. That their sole purpose and motive in instituting this action is to prevent the illegal and wrongful use of the property, business and assets of the Woolson Spice Company, for the purposes aforesaid, to the injury of said company and its stockholders, and thereby to defend themselves against the unlawful aggressions of the parties purchasing said controlling interest in the stock of the said the Woolson Spice Company, for the purposes and in the manner set forth in the petition and in this reply, to protect themselves in their right to engage in the business of refining sugar in the United States—and for no other purposes and with no other intention whatsoever.

Plaintiffs admit, that it is probably true that there has been a large increase in the amount of sales of the Woolson Spice Company due to said reductions in the price of the product, that, to a slight extent, the increase in the volume of business enables the company to sell at a less margin of profit than when the volume of business is smaller; and say that it is true that Arbuckle Brothers, the plaintiffs herein, have for several years past, reduced the price on roasted coffee sold by them, at will, and that they have been the largest dealers in roasted coffee in the country; but deny that they have controlled the market or maintained their ascendancy because no competition was strong enough to make competition active enough to affect them until the business of the Woolson Spice Company began to assume proportions which made it next to the said Arbuckles in the volume of its business.

They admit that they were under no obligations to buy into the Woolson Spice Company, and that they bought the stock with their eyes open. And there is a substantial denial of all the other allegations of the answer.

All of the defendants who have been served with process have filed a motion to dissolve the temporary restraining order allowed *ex parte* at the beginning of this action; and, in their motion, set forth a number of reasons why it is claimed the injunction should be dissolved.

Among other grounds, it is claimed, that the petition is without equity, and that the allegations of the petition are untrue in fact.

In so far as said motion is based upon the claim that the petition is without equity, that objection has been disposed of in overruling the demurrer of the defendant Newman to the petition.

The chief ground relied upon, however, in support of this motion, is, that the allegations of the petition are untrue in fact. To the establishment of this proposition a large amount of one testimony and affidavits has been introduced. On this question, the burden is upon the defendants to disprove the equities of the petition. Such full and posi-

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tive proof however, is not exactly as would be necessary upon a final hearing of the case, since the effect of requiring such strictness of proof might be to prevent the dissolution until the final hearing. High on Injunctions, sec. 1470.

It is claimed by the plaintiffs that the real purpose of the buyers of this stock in investing their money in the same, was to gain control of The Woolson Spice Company and so use that concern in the production and sale of coffee as to compel The Arbuckle Brothers to keep out of the sugar refining business; but this simply means that the intention of the buyer was to put roasted coffee upon the market in such quantities and at such prices as would, under the laws of trade, take from Arbuckle Brothers the business which theretofore they had been able to hold, by reason of their ability to actually dictate the lowest price at which roasted coffee should be sold to consumers; and thus make Arbuckle Brothers either concede to the American Sugar Refining Company a monopoly in the sugar business, or submit to a possible destruction of their own monopoly of the coffee business.

Now one monopoly of a necessity of modern life is entitled primarily to no more consideration than another; but how such purpose, though entertained by the controlling stockholders of The Woolson Spice Company, in view of the evidence in this case, can be deemed a misuse of corporate power in the sense contended for by plaintiffs, when the legitimate objects of the company's creation are being accomplished at the same time, is difficult to understand. Nor do I see, as council for plaintiffs seem to contend, that an agreement of the majority stockholders to sell the product of the corporation, for a time, at such price as to drive a competitor out of business, will make the corporation an unlawful conspiracy against such competitor, and all parties connected therewith personally liable to him for damages for his actual loss, or entitle him to appeal to a court of equity to restrain a threatened injury of this kind. A competitor for public favor, in disposing of his wares, must bow to that law of trade of that allows every man to dispose of his own property in the ordinary course business, on such terms as he sees fit. Courts of justice can take no notice of "injuries of this character.

Many questions of interest and importance, touching upon the law applicable to this case, in almost all of its possible phases, have been argued at length by counsel for the respective parties, with great learning and ability; but I have not found it necessary nor profitable to more fully consider the legal question involved, at this time. The question of the right of the plaintiffs to a continuance of the restraining order until the final hearing of the cause, in view of well established rules of law, depends upon the proof of the facts stated in the petition; and as the evidence satisfies me that the facts upon which plaintiffs must stand to

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entitle them to the relief heretofore given, have been substantially disapproved, the motion for the dissolution of the restraining order will be granted; and the plaintiffs' motion for the appointment of a receiver, will be overruled.

*John F. Kumler and A. L. Smith, attorneys for plaintiffs.
Doyle & Lewis, for defendants.*

CONSTITUTIONAL LAW—INSOLVENCY LAWS

[Clinton, Common Pleas, July 1900.]

IN RE ASSIGNMENT OF JOSEPH W. SUMMERS.

1. CONSTITUTIONAL LAW—ACT RELATING TO CONVEYANCES BY INSOLVENTS.

Section 6343 Rev. Stat., as amended 39 O. L. 290 and 291, providing that every sale, conveyance, transfer, mortgage or assignment made by a debtor or debtors in contemplation of insolvency shall be void, or, in the event of a deed of assignment for creditors being filed within ninety days after the giving thereof, shall be void, if such debtor or debtors were actually insolvent at the time of such giving and providing that nothing therein contained shall affect any mortgage made in good faith to secure any debt or liability created simultaneously with such mortgage, if the same be properly filed, as therein described, is constitutional.

2. SECTION 6344, REV. STAT., IS ALSO CONSTITUTIONAL.

Section 6344, Rev. Stat., as amended 39 O. L. 290 and 291, providing that any creditor as to whom any of the acts in sec. 6343 are void may commence an action to have such acts declared void, and any assignee shall bring suit to recover all property so sold, conveyed, mortgaged or assigned, or in case of his failure to commence such suit, upon notice to do so by a creditor, such creditor may himself commence such suit, is constitutional.

3. MORTGAGE BY INSOLVENT—VALIDITY

A chattel mortgage given by an insolvent person to a bank to secure a certain sum of money, within ninety days before making an assignment for creditors, a part of which sum was an old debt owed by the insolvent to the bank, and a part was for money advanced by the bank to the insolvent at the time of the giving of the mortgage, is void as to the pre-existing indebtedness and valid as to the money so advanced.

BROWN, J.

This matter comes before the court on appeal from the probate court.

Joseph W. Summers made a general assignment for the benefit of his creditors to E. J. Hiatt and the same was duly filed in the office of the probate judge of said county on November 29, 1899, at 12.40 P. M. Hiatt forthwith qualified as assignee and has been acting as such.

On December 12, 1899, the assignee applied to the probate court for an order of sale of the personal property, the personal property was sold and before distribution, the New Vienna Bank, claiming to be a creditor, on January 22, 1900, was made a party defendant and leave was granted to plead forthwith. And thereupon it filed its answer and cross-petition.

It avers that it is a partnership organized under the laws of Ohio for the purpose of carrying on a banking business, waives the issuing and

service of summons and voluntarily enters its appearance, and avers that the said Joseph W. Summers is indebted to it in the sum of one thousand dollars on a promissory note, dated November 27, 1899: that at the time of the delivering of said note, the said Summers executed and delivered to it a chattel mortgage upon the following described goods and chattels: 185 hogs, 25 long yearling steers, and 25 yearling steers, all being on the farm of said Summers in Greene township, Clinton county, Ohio, and sets up the condition of the mortgage, that the mortgage was duly filed at 12.80 P. M. on November 27, 1899: that the bank had no other security therefor and asks the court to determine the amount due upon the note and asks for payment from the fund.

The assignee files an answer to this pleading, admitting that the bank is a partnership, averring that he knows nothing of the various matters set forth in the cross-petition and therefore denies them. For a second defense, says that the note, for a thousand dollars set up by the bank represented a old debt which was simply renewed about September 27, 1899 for the purpose of giving said New Vienna Bank a preference for the exclusion in whole or in part of the other creditors of Summers; that Summers was, on November 27, 1899, insolvent; that on November 28, at 12.40 P. M., he made a general assignment to the said E. J. Hiatt, who forthwith qualified and is now the assignee; that the execution and delivery of the mortgage to the bank was with the intent to hinder, delay and defraud the other creditors of Summers; denies that the mortgage evidences any new debt or liability created simultaneously with the mortgages, but avers that the sole consideration for the mortgage is a prior debt, and that no new debt or liability whatever was created at the time of the execution and delivery of the mortgages; and prays that the mortgage may be set aside and the property conveyed thereby may be ordered distributed among the general creditors of said Summers.

The bank replied by denying all the allegations contained in the answer of the assignee.

On March 21, the probate court found upon the law and the evidence in favor of the said assignee on his said answer and that the mortgage set out in the cross-petition of the bank was given to secure a preexisting indebtedness of the said Summers and for the purpose of giving the said bank a preference to the exclusion in whole or in part of the other creditors; that Summers was, on November 27, 1899, insolvent, that the assignment was made on November 29, and that the mortgage was made to hinder, delay and defraud the other creditors of Summers, and that the mortgage is void and of no effect as against the other creditors of Summers, and thereupon vacates and sets aside and cancels the mortgage and renders judgment for costs against the bank. Thereupon a notice of appeal is given, appeal bond fixed and given by the bank and the matter comes into this court.

In re Summers.

A hearing was had and after the close of the testimony, counsel for the bank filed a demurrer to the answer and cross-petition of the assignee upon the following grounds:

"1. Said probate court had no power or jurisdiction to determine the issues presented in said answer and cross-petition touching the validity of said chattel mortgage held by said the New Vienna Bank.

2. Said probate court had no power or jurisdiction to declare said chattel mortgage void as to the other creditors of said assignor, nor as to said assignee, nor to decree a cancellation thereof, nor to declare that the same inured to the benefit of all the creditors of said assignor.

3. This court on appeal has no power or jurisdiction to inquire into or determine any of the matters aforesaid."

The testimony shows that on November 27, 1900, the said Summers was indebted to the bank upon an old note upon which his father was security in the sum of \$618.78 and he stated to the bank that he desired to purchase some feeding cattle, and hogs, as he had considerable corn and desired to make an additional loan, to make the amount of his indebtedness one thousand dollars, that the bank agreed to increase the loan provided he would give it a chattel mortgage upon the live stock. Thereupon Summers executed his note for one thousand dollars, due in ninety days and gave his chattel mortgage upon the livestock and the bank advanced him \$871.72.

The cashier of the bank who transacted the business testified that he had looked upon the mortgage record and knew that there were some mortgages against the farm of Summers, that he asked Summers several times about his business, that said he was getting along all right and was paying his debts, and that he had no idea that Summers was insolvent at that time, and that he was under the impression that Summers would be able to pay his debts, that he had regarded Summers as a solvent upright man; that he had regarded John J. Summers, the security on the old note as perfectly solvent and a good man, and examined the record as to John J. Summer's mortgage indebtedness and he found some mortgages but that he considered him good.

It was admitted by counsel at the trial that Joseph W. Summers was insolvent at the time of making the chattel mortgage, that at the time of the execution of the mortgage he had mortgages on his real estate for about five thousand dollars in excess of its value. It is further admitted that the assignee realized \$734.95 from the sale of the live stock. There were in fact only nineteen head of cattle instead of the number named in the chattel mortgage.

J. W. Summers testified that at the time of the giving of the chattel mortgage to the bank that he had no intention of making an assignment and no intention of preferring the bank over any other creditor, or to hinder, delay or defraud any other creditor, nor was it his intention at that time to make an assignment for the benefit of his creditors.

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The finding of the probate court was founded upon secs. 6343 and 6344, Rev. Stat., as amended in 93 O. L., 290 and 291, as follows:

"Sec. 6343. Every sale, conveyance, transfer, mortgage or assignment, whether made in trust or otherwise, by a debtor or debtors, and every judgment suffered by him or them, and every act or device done or resorted to by him or them, in contemplation of insolvency, or with a design to prefer one or more creditors to the exclusion in whole or in part of others, and every sale, conveyance, transfer, mortgage or assignment made, or judgment suffered by a debtor or debtors, or procured by him or them to be made, in any manner, with intent to hinder, delay or defraud creditors, shall be declared void as to creditors of such debtor or debtors, at the suit of any creditor or creditors, as hereinafter provided, and shall operate as an assignment and transfer of all the property and effects of such debtor or debtors, and shall inure to the equal benefit of all creditors of such debtor or debtors in proportion to the amount of their respective demands, including those which are unmatured. And every such sale, conveyance, transfer, mortgage or assignment made, and every such judgment suffered, and every such act or device done or resorted to, by any debtor or debtors, in the event of a deed of assignment being filed within ninety (90) days after the giving or doing of such thing or act, shall be conclusively deemed and held to be fraudulent, and shall be held to be void as to the assignee of such debtor or debtors, whereupon proof shown, such debtor or debtors was or were actually insolvent at the time of the giving or doing of such act or thing, whether he or they had knowledge of such insolvency or not. Provided, that nothing in this section contained shall vitiate or affect any mortgage made in good faith to secure any debt or liability created simultaneously with such mortgage, if the same be filed for record in the county wherein the property is situated, or as otherwise provided by law, within three (3) days after its execution, and where upon foreclosure or taking possession of such property the mortgagee fully accounts for the proceeds of such property."

"Section 6344. Any creditor or creditors, as to whom any of the acts or things prohibited in the preceding section are void, whether the claims of such creditor or creditors has matured or will thereafter mature, may commence an action in a court of competent jurisdiction to have such acts or things declared void, and such court shall appoint a trustee according to the provisions of this chapter, who upon being duly qualified shall proceed by due course of law to recover possession of all property so sold, conveyed, transferred, mortgaged or assigned, and to administer the same for the equal benefit of all creditors, as in other cases of assignments to trustees for the benefit of creditors. And any assignee as to whom anything or act mentioned in the preceding section shall be void, shall likewise commence a suit in a court of competent jurisdiction to recover possession of all property so sold, conveyed, transferred, mort-

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gaged or assigned, and shall administer the same for the equal benefit of all creditors as in other cases of assignments to trustees for the benefit of creditors ; provided, that where such assignee fails or declines, upon notice by any creditor or creditors to institute such suit, such creditor or creditors may themselves institute such suit within five days after serving notice upon such assignee to commence such suit, and the procedure and administration shall be the same as is hereinbefore provided for suits commenced by any creditor or creditors."

The question of the constitutionality of these sections as amended was raised by counsel for the bank, and a demurrer was afterwards filed for that purpose. The origin of these sections in controversy was the act of 1835, Curwen, 161, which inhibited only fraudulent conveyances. This was amended in 1838, Curwen, 424, which referred to all assignments of property in trust to trustees in contemplation of insolvency with design to prefer one or more creditors to the exclusion of others, should be held to inure to the benefit of all of the creditors. This act was amended in 1853, giving the court control of such trust, with authority to require security from the trustees. This act was amended in 1859, S. & C. page 712, section 16 of the Insolvent Debtors Acts, which provided that all assignments in trust to a trustee or trustees made in contemplation of insolvency with intent to prefer one or more creditors shall inure to the equal benefit of all creditors in proportion to the amount of their respective claims, and the trusts arising under the same shall be administered in conformity with the provisions of this act.

This act was carried into the revision of 75 O. L., 938, and the two sections of that act were carried into the revision of 1880 and became secs. 6343 and 6344, Rev. Stat.

Under these sections two classes of assignments were declared voidable. Under sec. 6343 assignments in trust to a trustee in contemplation of insolvency and with intent to prefer one or more creditors, and under sec. 6344 to hinder, delay and defraud creditors and unless the transaction came under these sections creating a trust or were made with specific intent to defraud, it was valid. All preferences were not condemned and only under these circumstances did the special assignment for particular creditors become a general assignment for all the creditors. The debtor although hopelessly insolvent might still prefer his creditors by paying money, by the transfer of any of his property either by mortgage or deed, by confessing judgment, by collateral security. This is clearly stated in Cross, Trustee v. Carstons, 49 Ohio St., 548, and the cases therein cited and referred to.

Counsel argue that under these sections as now in force, every sale, conveyance, transfer, mortgage or assignment, whether made in trust or otherwise, every judgment suffered and every act done by a debtor—(1) in contemplation of insolvency, or (2) with design to prefer, or (3) with intent to hinder, delay or defraud, shall be declared void at the suit

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of any creditor, and (4) in every act as aforesaid done or suffered, in the event of an assignment being made by such debtor within ninety days after, shall be conclusively deemed fraudulent and void as to his assignee whether he was actually insolvent at the time of the giving or doing of such act or thing, and whether he or they had any knowledge of such insolvency or not; that all possible forms of transferring property and all possible modes of acquiring security are condemned, the trust feature of the old statute being eliminated; that a party who deals with a debtor is left absolutely at the debtor's mercy; that even if the transaction is honest when made with no fraud or illegality, it may by one party be converted into a conclusively fraudulent transaction by simply making an assignment within ninety days.

Counsel in this case argue very elaborately and at great length, citing examples and authorities to show that this law was in contravention of the constitution, was unconstitutional and void, and that, therefore, secs. 6343 and 6344, Rev. Stat., should remain as they were prior to this enactment.

I have studied this question very closely, and while I frankly admit to counsel that I have grave doubts as to some of the features of the act, I cannot make up my mind that it is such a case as should warrant a common pleas judge in holding an act of such great importance (and which has been acted upon for over two years in this state without having been so declared by a higher court as) unconstitutional and void.

I have come to the conclusion that the interpretation placed upon it by counsel of the bank is somewhat strained notwithstanding his many able arguments, citations and illustrations. The intention of the legislature was evidently to rearrange and add to these sections, as suggested by Judge Spear in *Cross, Trustee, v. Carstens*, 49 Ohio St., 548, 566, wherein he says:

"Had it intended to include within the class of instruments which were to be held as general assignments for the benefit of creditors equally, all transfers and conveyances whatever made by a failing debtor, what more easy way than to say just that thing?"

The sections have been changed by the addition of the provision as to suffering or procuring judgments by the insolvent debtor,—otherwise the only change from the effect of the original is the addition declaring certain acts done within ninety days "shall be conclusively deemed and held to be fraudulent and shall be held to be void as to the assignee whereupon proof shown" such debtor or debtors was or were actually insolvent at the time, whether the creditor had knowledge of such insolvency or not. The amendment simply limits the time to ninety days within which time "upon proof shown" that the debtor was actually insolvent whether the debtor knew it or not, the sales, etc., provided for in the original section shall be conclusively deemed and held to be fraudulent and shall be held to be void as to assignee. Under this amend-

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ment, if a debtor was actually insolvent whether known or not, the conveyance is *per se* fraudulent, but this must be established by proof.

The only change made from the original section in regard to transfers is that in regard to judgments and that any such conveyance and judgments made within ninety days of the assignment shall be deemed fraudulent and void if the proof shows the debtor was actually insolvent.

And leaving the question of intent which it was necessary to show under the original sections, it is only when a deed of assignment is made that the conveyance becomes fraudulent and void by the suit of the assignee, not of the debtor.

Before the amendment, if the sale, etc., was made in contemplation of insolvency, etc., an action could be brought by any creditor to set the same aside, and if the proof was sufficient, the same was declared void and a trustee appointed. Under these sections as amended, no other or greater rights were given to the creditors, but only as to the assignee is the same fraudulent and void "upon proof shown" that the debtor was insolvent. If the proof should show that the debtor was not insolvent but became insolvent afterwards, then this provision does not apply. Unless there was an attempt to prefer, to hinder, delay or defraud, or the debtor was insolvent at the time, there could have been no trusteeship declared under the old statute, and there cannot be under these amended sections unless such facts exist and are proven. There are no greater rights conferred upon the creditor or the debtor by the amendment than existed under the old statutes, and the amendment simply declares that all such sales and judgments suffered; with this exception, being those included in the original sections "upon proof shown" that the debtor was insolvent at the time, that shall be held fraudulent and void as to the assignee in a suit brought by him for that purpose with which power this amendment clothes him and which the assignee could not do under the former sections.

It is not a strained construction to say that in this section as amended every sale etc., made in contemplation of insolvency or with intent to prefer, or to hinder, delay or defraud, should be declared void as to creditors, and shall operate as an assignment, and in the event of a deed of assignment being filed within ninety days after such act, it shall be conclusively deemed fraudulent as to the assignee "upon proof shown" that the debtor was insolvent at the time of such act, whether the debtor or the creditor had knowledge of such insolvency at that time or not.

In this case under this statute, Summers being an insolvent at the time the chattel mortgage was given and the assignment having been made within the ninety days provided in the section, there was conclusively, under this section, a design to prefer as to the pre-existing debt, and to that extent the chattel mortgage was properly declared void, but as to the money advanced at that time, it was not fraudulent or void, and does not come within this section of the statute. The amendment does

not interfere with *bona fide* contracts and sales and so forth, where the relation of creditor and debtor did not theretofore exist, and there was no fraud in the transaction. Where creditors seek payment on security they must know the condition of the debtor, and if they take the risk of an assignment within ninety days, they do so with their eyes open.

Demurrer overruled.

The finding will, therefore, be that the New Vienna Bank is entitled to receive from the assignee the amount of \$371.12 less legitimate expenses and no lien on the fund as to the balance of their claim, but it will be allowed as a claim in the general assignment, and the costs of this proceeding adjudged against the assignee.

D. B. VanPelt and Mr. Moore, for bank.

Mills & Clevenger, for assignee.

WILLS—LIFE ESTATES—PARTITION.

[Hamilton Common Pleas, 1900.]

DORA L. HELMIG v. JOHN C. MEYER ET AL.

1. WILLS—EXPLANATORY CLAUSE CONTROLLING.

An explanatory clause in a will containing clear and distinct words of perpetuity will control doubtful language used in another clause, especially if the latter attempts to create entailments or limitations.

2. EXECUTOR OBTAINS NO TITLE.

An executor obtains no title and has no power to convey real estate unless there are words expressly granting him title, and then only for the purpose of realizing money to pay debts or as a trustee to carry out designated trusts.

3. PARTITION WITH CONSENT OF LIFE TENANT.

Partition may be had where the life tenant consents to a sale free of the life estate and it appears to the court that a sale will not be prejudicial to the interests of the remaindermen.

IN PARTITION.

PFLEGER, J.

Mary A. Meyer died testate in July, 1897, possessed of personal property valued at over \$20,000 and real estate worth perhaps as much. She left two children—a son, John F. Meyer, and a daughter named Dora L. Helmig. John F. Meyer died November 10, 1899, leaving a widow, Harriet Meyer, and six children, three of age and three minors. Dora L. Helmig, the daughter, still survives, and has living one child, named William Helmig, a minor twenty years of age.

Mary A. Meyer left a will, item 2 of which reads as follows :

" Item 2. * * * I give, devise and bequeath to my son, John Frederick Meyer, and his children, the one undivided half of the real estate and personal property forever, and to my daughter, Dora Meyer, who is now married to F. W. Helmig, her child or children, the one undivided half of the real estate, personal property and effects that may be then left and unexpended, and the same to be divided between my two

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children, John Frederick Meyer and Dora Meyer (now Dora Helmig) and their child or children."

In item 7 she provided that :

"In case of the death of my daughter or child or children, then in that case all of my bequests made by me to my daughter Dora and her child or children, all of the bequests so made shall be and I hereby give and devise and bequeath all of the real estate and personal property devised and bequeathed as hereinbefore given to my daughter, Dora Meyer, and child or children to the children of my son, John Frederick Meyer, who are then living and their heirs forever."

In item 5 she states that her daughter has always been faithful to her father and mother, and that therefore she gives and devises "to her during her natural life all as set forth hereinbefore, and after her death the same to be given to her child or children forever."

In item 6 she states that in view of the disgraceful conduct of F. W. Helmig, the husband of her daughter, Dora, she prays the court that "if there should be one or more children then living and not of lawful age, and he then claiming to be appointed as guardian of the estate of my daughter's child or children that he shall give a good and sufficient bond as required by law."

In item 8 she expresses an intent to transfer all her stocks, effects and claims before her death to her son, John Frederick Meyer, "his heirs and assigns forever, and to my daughter, Dora Meyer, and her child or children by way of a bill of sale" * * *.

In item 9 she directs that her son be appointed executor, and authorizes her son, "John Frederick Meyer, to transfer by deed or otherwise all of the real estate given by me to my daughter, Dora Meyer, wife of F. W. Helmig, during her natural lifetime, and after her death to her child or children and their heirs forever."

In item 10 she prays that her two children immediately after her death meet by themselves and divide between themselves all of their real and personal property which had been given them by her as theretofore set forth.

In item 11 she authorizes her son to transfer to her daughter "during her natural lifetime and to her child or children forever all of the real estate and personal property free, clear and unencumbered either by deed or otherwise as the same has been provide hereinbefore as if I was and would be present."

The plaintiffs, Dora L. Helmig and her son, William, claim that under this will Dora L. Helmig, the daughter, took a life estate and the plaintiff, William Helmig, a fee simple of the undivided one-half of the entire estate, real and personal, and they ask partition thereof.

The defendants claim that the devise to the son, John Frederick Meyer, under item 2 is an absolute fee simple to the other undivided one-half of the entire estate, real and personal, and that the son having died

intestate this one-half descendent to his six children subject to the dower right of Harriet Meyer, the widow of John F. Meyer; and they also ask partition. The defendants also claim that the other one-half of the estate goes to Dora L. Hemig for life, then to William for life, and under item 7 of the will, after the death of both, in fee simple to the surviving children of John Frederick Meyer.

The defendant, Daniel Dreyfus, administrator *de bonis non* of the testatrix, Mary A. Meyer, denies the title of the plaintiffs as claimed by them, asks for a construction of the will, and insists that under items 9 and 11 the title to the daughter's share, of all the property, real and personal, passed to him as executor and trustee, and therefore whatever the interests may be as between the daughter and her children and the son and his children, as to this particular one-half, no partition could be made.

It is admitted by defendants' counsel that the division of the estate in item 2 as between the son and daughter is half and half, and a construction on that point is for that reason unnecessary.

It is admitted by plaintiff's counsel that Dora L. Helmig is not entitled to a fee simple but to a life estate only.

The issue is therefore narrowed to two questions: (1) Does the plaintiff, William Helmig, take only a life estate in the one-half given to his mother, or does he take a fee simple title? (2) Does the executor take any title in trust to this one-half share to the daughter?

Item 2 giving the property to "Dora, her child or children," standing alone, would give the daughter Dora, an absolute fee simple title. With item 6, "to her during her natural life," "and after her death the same to be given to her child or children forever," would, under sec. 5968, Rev. Stat., excluding the rule in Shelley's case, give her a life estate and vest in her son, William, a remainder in fee simple forever.

Item 2, together with item 7, which provides that in case of the death of the daughter or her child or children (and it is admitted by both counsel that under *Lessee of Ward v. Barrows*, 2 Ohio St., 241, the conjunction used in the words "daughter or child or children" should read "daughter and her child or children") the estate should pass to the then living children of John Frederick Meyer, would pass a life estate to Dora Helmig, another life estate to her son William, and the fee simple in remainder to the children of John Frederick Meyer, provided, of course, that the words "in case of the death of my daughter or child or children" refer to the inevitable death of both the daughter and her children, and not to such death preceding the death of the testatrix.

It is true the will has verbiage and is bunglingly drawn. Taking the whole by its four corners, is the intention of the testatrix to create a life estate in the child of Dora or a fee simple? The division contemplated in items 3 and 10 between the son and daughter throw no light

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upon the question, because the division was to be made "as hereinbefore set forth," and a division by giving to the daughter and her son a life estate and to the children of John Frederick a remainder, is not inconsistent therewith. Nor does item 6 aid us, in which she requests that F. W. Helmig be required to give bond as guardian of the estate after the death of Dora if one or more of the children be then living and of legal age, because he may be guardian of a life estate, or the income thereof, as well as of a fee simple; nor item 8, evidencing her intention to transfer her personality before her death to her son, "his heirs and assigns forever," and to her daughter "and her child or children," especially if taken in connection with the other clauses in the will. Standing alone, item 8 seems to differentiate the respective titles to the son and daughter by the use of the different words. These expressions are both words of perpetuity with reference to the personality.

Item 5 expressed her appreciation of the faithful services rendered by the daughter, and because of such faithfulness she gave all of the property therein set forth to Dora during her natural life, and after her death "to her child or children forever." In item 9 she directed the son, as executor, to deed to their daughter the real estate "during her natural lifetime, and after her death to her child or children and their heirs forever." Item 11 is practically a repetition of item 9, and therein she directed her executor to transfer the real and personal property to Dora "during her natural lifetime, and to her child or children forever."

In items 5, 9 and 11 there are, therefore, strong words of perpetuity wholly inconsistent with the theory that William Helmig took a life estate. There is nothing in the entire will to indicate that the daughter was not as highly esteemed as the son, or, indeed, entitled to less. The usual precautions taken against a thriftless son-in-law are apparent. This may account for the life estate only to the daughter.

Plaintiff's counsel cite over fifty authorities, and defendants' quite a number. I have examined those specially cited on both sides, excepting the ones not applicable, copied from Bates' digest, on the different constructions of wills. Defendants cited *Bates v. Zinsmeister*, 26 Ohio St., 461, wherein the court ordered the estate to pass to brothers and sisters under a devise to the daughter for life and after her death to her child, providing such child, without having issue died under twenty-one, then to the brothers and sisters.

In *Weston v. Weston*, 38 Ohio St., 473, an estate was held to pass to the widow under a devise to the child, and in case of the death of the child without issue to the heirs.

Collins v. Collins, 40 Ohio St., 353, holds that when an interest is conveyed in clear and decisive terms, it can not be taken away by subsequent words or clauses not as clear and decisive.

Rhodes v. Weldy, 46 Ohio St., 234, holds that where some words or phrases are used more than once, they receive the same construction

where they are of doubtful meaning as where they are clear, unless the connection plainly calls for a different construction.

Johnson v. Johnson, 51 Ohio St., 446, was a case of a devise to a wife of all real as well as personal property, with power to dispose of it, but any unconsumed property to be divided between the brothers and sisters of the testator; and it was held to convey a life estate only in both real and personal property, and the vested remainder in the brothers and sisters.

In Durfee v. McNeil, 58 Ohio St., 288, a devise to two children, and on either dying without heirs then all to the survivor, was held to vest in each an estate in fee simple determinable upon the death of the other without children, although the one died leaving a husband surviving her, and the word "heirs" was construed to "children."

It is unnecessary to cite many of the elementary rules of construction applicable hereto. The whole instrument should be construed as one, and effect given to every part if possible. Decker v. Decker, 3 Ohio, 166. The policy of Ohio, which is unfavorable to details, is also unfavorable to provisions tying up property and will not by liberal construction create limitations. Bierce v. Bierce, 41 Ohio St., 256. A will generally speaks from the time of the death of the testator and not from the date of its execution. Board of Education v. Ladd, 26 Ohio St., 210.

There are two cases which to my mind seem to be peculiarly applicable to the case at bar. The first is Baker v. McGrew, 41 Ohio St., 113. In that case there was a devise of a part of a residue to two grandchildren, and if both died without issue the property coming to them should be given to other grandchildren. It was held that the title should not be held contingent unless unavoidable, and that an absolute gift is not to be qualified by a remainder or an executory devise without clear intent; and that, therefore, the contingency referred to the time of the testatrix's death, and if the two grandchildren survived her, their shares became absolute, and on their death without issue passed to their heirs and not to the other grandchildren.

The other case is that of Patterson v. Earhart, 6 Dec., 16. This is an able opinion rendered by Judge Bates. A devise was made absolute to A, with a limitation over that if she dies then to her child, or if the child dies then to her surviving children. The limitation over on the death of the devisee without other words was here construed to mean death in the testatrix's lifetime. In this case there was no expression of avoiding an objectionable son-in-law, but the intent of the testator was held to be to prevent a lapsing of a share into an intestate *residuum*. It is said that to refer to death in the words "if he dies" or "in case he dies" as relating to some uncertain period or as contingent, when the event is inevitable, is absurd. Many authorities are there cited as showing that if any equivocal language appears it must be held to relate to

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the death of the testator. In this case there were no words of perpetuity such as "heirs" or "forever."

If it is permissible then in the case at bar to apply this construction to item 7, and that the words "in case of the death of my daughter and child or children," in order to carry out the intention should be interpreted as if followed by the words "before my death," no other evidence need be sought for to support the contention that William Helmig took a fee simple subject to his mother's life estate.

And it is argued with some force that if the intention of the testatrix was to give the estate to the surviving children of John Frederick Meyer after the death of Dora Meyer and her son, William, the words "upon the death of my daughter and her children" should have been used, and the words "children forever" in item 5 and item 11, and the words "her children and their heirs forever" in item 9, should have been omitted.

And again, under another rule of construction, that where a clause is clear and distinct it should control over a clause or phrase less clear and decisive, item 5 is explanatory of all the other items as to the exact nature of the interest of Dora and her son. The testatrix says: "Because of her faithfulness I give her 'during her natural life all as set forth herein above, and after her death the same to be given to her child or children forever.'" The word "forever" seems to have been designedly used; and with greater force are the words "to her child or children and their heirs forever" in item 9. The instrument as a whole seems to breathe the desire of the testatrix to divide the shares between the son and daughter, and to limit the estate of the daughter for life merely because of the apprehension regarding her son-in-law. In order to hold that William Helmig has only a life estate and that the surviving children of John Frederick Meyer have the remainder, the court would be compelled to reject entirely the clear words of perpetuity reiterated in items 5, 9 and 11, and accept the doubtful phraseology in item 7. This, however, can not be done.

2. The question whether, under items 9 and 11, in which the testatrix authorizes her son, as "executor" and "administrator," to make transfers to Dora and to her child or children, passes the title interests of the daughter to the executor in trust, and that he must convey is not so difficult of solution.

It is a well known principle of law that an executor, as such, does not take title to real estate. He may, as such "executor," be in a fact a trustee to carry out certain trusts, or to convey for the purpose of realizing money to pay debts. He is authorized by statute to pass the title to real estate to purchasers. If there is an object to be attained, the transfer to the trustee may be supported; but there are in this case no debts to be paid, and there is no express language of title to the executor, no purpose is to be subserved, no reason is assigned why he should

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take the title. The gift to Dora Helmig and her children is made directly to her and her children, and not through a trustee. Under item 10 she wants this division made immediately after her death. As she had ample personal property to pay her debts, there was no object in delaying a transfer. It is apparent that the testatrix or the scrivener erroneously assumed that it was necessary for the executor to give Dora Helmig and her children a deed to perfect the title. The executor therefore took no title to the share coming to Dora L. Helmig or her son.

3. Another question is raised by defendants' counsel. He claims that in order to entitle plaintiffs to a partition, plaintiffs, or one of them, must own an interest for life as well as remainder. Patterson v. Earhart seems to hold that the owner of a fee subject to an executory devise over on his own death without issue may have partition. So it has been held in Tabler v. Wiseman, 2 Ohio St., 207, that neither rever-sioners nor remaindermen can have partition, because partition under the statute by its very nature affects possession of real property.

Our circuit court has held in Eldred v. Bass, 1 Circ. Dec., 23, reviewing the authorities, that if the life tenant consents to a partition or sale free from the life estate and to take the value of the same in money, and if it appear to the court that it will not be to the prejudice of the other parties in interest, a partition and sale may be had.

This is the position of Mrs. Helmig and her son. It is admitted by defendants' counsel that the children of John Frederick Meyer have prayed for partition and will ask for the same without regard to the conclusion of the court as to the share coming to Mrs. Helmig and her children.

The conclusion of the court, therefore, is that under item 2 of the will the children of John Frederick Meyer take a fee simple title of the undivided one-half of all the personality and all the real estate, subject to the dower of the widow, Harriet Meyer. That Dora L. Helmig takes a life estate in the other one-half of the real and personal property, and her son, William Helmig, a vested remainder in fee simple to such other undivided one-half of the real and personal property, subject to the life estate of Dora L. Helmig. That Daniel Dreyfoos takes no title, either as trustee or as administrator *de bonis non*, to any of the real estate; and that plaintiffs jointly are entitled to have partition made of the pre-mises, and decree will be entered accordingly.

Theodore Horstman, for plaintiffs.

Geo. W. Harding, for defendants.

In re Mills.

REVENUE STAMPS—DEEDS OF ASSIGNMENT.

[Hamilton Court of Insolvency, 1900.]

IN THE MATTER OF THE ASSIGNMENT OF CHARLES L. MILLS.

DEEDS OF ASSIGNMENT NEED NOT BE STAMPED.

A deed of assignment for creditors is not subject to internal revenue tax, as such a transfer is in no sense a sale, merely conveying to a trustee the title to the property to be administered under the direction of the court.

FERRIS, J.

H. R. Probasco presents for filing and record a deed from Charles L. Mills to him, as assignee for the benefit of his creditors, and requests that the deed be filed without having attached thereto United States internal revenue stamps. The court is of the opinion that such a transaction as an assignment in trust for the benefit of the creditors is not liable to the internal revenue tax, for it is in no sense a sale, but merely conveys to a trustee the title to the property to be administered under the direction of the court, by a conversion of the property into cash and the payment therefrom of the debts of the assignor. The commissioner of internal revenue, in a circular letter addressed to the collectors of internal revenue of the United States, which letter bears date of March 9, 1900, and the opinion of Phillips, district judge, sitting in the circuit court of the United States for the western division of the western district of Missouri, in Julia Mastin v. Thomas H. Mastin, seems conclusive authority, but Mr. Robinson, of counsel in this case, has received the following letter from the commissioner of internal revenue, bearing date July 25, 1900:

"WASHINGTON, July 25, 1900.

"JAMES E. ROBINSON, Esq.,

"Attorney at Law,

"Atlas Bank Building,

"Cincinnati, Ohio.

SIR: Replying to your letter of the 21st instant, you are advised that a deed of assignment for the benefit of creditors is not taxable as a conveyance of real estate. When the assignee conveys real estate, either in pursuance of a sale or to a creditor in satisfaction of his claim, the assignee's deed is taxable, but the deed of assignment is not required to be stamped.

Respectfully,

"G. W. WILSON,
"Commissioner,"

Which opinions coincide with that of this court in the construction of the war revenue act of June 13, 1898.

Wherefore, the assignee herein may take an order dispensing with the affixing of internal revenue stamps to the deed of assignment offered, and the deed may be filed without them.

CORPORATIONS—STOCKHOLDER'S LIABILITY.

[Superior Court of Cincinnati, Special Term, 1900.]

CARRIE BIGGIO V. CHRISTIAN SANDHEGER ET AL.

1. PRINCIPLE UPON WHICH LEGAL OWNERS ARE HELD.

The true principle upon which the legal owner, as distinguished from the equitable owner, of shares of stock in a corporation is held liable to creditors, is based upon the ground of estoppel. Where persons permit their names to appear upon the books of the company as the legal owners, the law will presume that creditors dealt with the corporation upon the faith of the individual responsibility of the stockholders who so appeared as the legal owners of the stock.

2. RULE DOES NOT APPLY WHERE FIDUCIARY CAPACITY APPEARS.

The foregoing rule does not apply where stock in a corporation is held in a trust or fiduciary capacity and the fact that it is thus held is disclosed by the stock books of the company. In such cases the creditor must be charged with notice of the fact that the party whose name appears upon the registry is not the real owner.

3. FACTS FROM WHICH CANCELLATION IS INFERRED.

A party who subscribed for shares of stock in the Union Banner Brewing Co. cannot be held for stock in the Banner Brewing Co. where it appears that upon discovering the fact he entered into a verbal agreement to take merchandise for the sum subscribed, from which it is fair to infer that the stock was to be canceled.

4. PERSONS SUBSCRIBING FOR STOCK UNDER ANOTHER NAME.

Persons who subscribed for stock in the Union Banner Brewing Company, cannot be held as stockholders in the Banner Brewing Company, although their names appear on the stock books of that company, where there is nothing in the evidence tending to show that such persons had knowledge of the fact or knowingly permitted their names to remain on the books of the Banner Brewing Company as stockholders.

5. ESTOPPEL—STOCK TAKEN BY DEVISEE UNDER VOID SALE.

A widow and devisee, who, without electing to take the stock, as executrix sells to herself, individually, the stock in question, and, through her attorney, has the same transferred to her upon the books of the company, and permits her name to remain upon the books as a stockholder, is bound by the principles of estoppel although the sale may be absolutely void as to other parties.

6. ATTORNEY RECEIVING STOCK AS SECURITY.

Stock held by an attorney as collateral security for a claim for legal services is not liable to assessment.

EXCEPTIONS to the report of the special master and referee.

JACKSON, J.

The main exception herein is to the finding and report of the referee as to the number of shares owned by Michael Hoffman upon which it is sought to hold said Hoffman liable for the benefit of creditors. The master holds that Hoffman was a stockholder to the extent of thirty shares only of the Banner Brewing Company, a corporation which is now wholly insolvent and in the hands of a receiver.

It is contended on behalf of the creditors that this is erroneous, inasmuch as 430 shares of the capital stock of the said Banner Brewing Company appear upon the stock books in the name of "Michael Hoff-

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man, Treasurer," and it is insisted that as the legal owner of the stock in question Hoffman is liable upon the 430 shares of stock, notwithstanding the fact that as to all but thirty of said shares said Hoffman was merely a trustee for others.

The conceded facts appear to be that a syndicate was formed for the purchase of a controlling interest in the Banner Brewing Company, and that Hoffman was to act as treasurer for the purpose of receiving the money from the members of the syndicate, with which money he was to purchase the stock, and that he was to purchase the stock in his own name and distribute the same thereafter ratably among the members of the syndicate; that he, as an individual, was to become the purchaser of but thirty shares of stock.

In this way Hoffmann purchased from certain owners of the stock of the Banner Brewing Company 430 shares, having the same transferred to him upon the books of the company in the name of "Michael Hoffmann, Treasurer," and in due time he transferred ratably to the different members of the syndicate 400 shares of said stock, retaining thirty shares as his personal property.

It is insisted by the creditors that during the time the 430 shares of stock stood in the name of Michael Hoffmann, treasurer, he is liable as shareholder on said stock to creditors of the company.

In Henkel v. Manufacturing Co., 39 Ohio St., 552, it was held that:

"The general rule, independent of statutory provisions, is that the liability to pay calls and to respond in the event of insolvency to creditors, attaches to the holder of the legal title only. The courts will not (save in exceptional cases) look beyond the registered stockholder."

Section 3259, Rev. Stat., provides that the term "stockholder," shall apply not only to such person as appears by the books of the corporation to be such, but to any equitable owner of the stock, although the stock appears on the books in the name of another.

Counsel for the creditors herein contend that the provisions of this section giving a right against the equitable owner of stock confers but a cumulative remedy, and does not in any wise militate against the rights of the creditor to proceed against the legal owner of the stock.

The conclusion I have reached is that the true principle upon which the legal owner, as distinguished from the equitable owner, is held liable to creditors, is based upon the ground of estoppel. By permitting himself to appear upon the books of the company as the legal owner of the stock in question, the law will presume that creditors dealt with the corporation upon the faith of the individual responsibility of the stockholders who so appeared as the legal owners of the stock.

But this rule cannot and does not apply where the stock books themselves disclose the fact that the legal owner of the stock holds the same in a trust or fiduciary capacity. Where the stock registry discloses the

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ownership to be in a trust or fiduciary capacity, the creditor must be charged with notice of the fact that the party whose name appears upon the stock book is not the real owner, and a creditor can not in contemplation of law be presumed to have given credit upon the faith of such stockholder's individual responsibility.

The conclusion I have reached is that Hoffmann's trust or fiduciary capacity was sufficiently disclosed upon the stock books of the company; that he is not individually responsible beyond the thirty shares which he personally owned, and that the report of the referee in this respect must be approved and confirmed.

The authorities which I have examined, and upon which I rely largely in support of this conclusion, are *Wells v. Larrabee*, 36 Fed. Rep., 866; *Pauly v. Loan & Trust Co.*, 165 U. S., 606, and *Baker v. Bank*, 86 Fed. Rep., 1006. I am unable to agree with the contention of learned counsel that these cases are not in point and that they are based upon a construction of secs. 5151 and 5152, U. S. Rev. Stat., and which latter section expressly provides that trustees shall not be personally subject to any liabilities as stockholders.

In all of these cases the decisions of the courts are based not upon the fact that the party sought to be held liable is a trustee within the meaning of sec. 5152, but, as stated in the language of justice Harlan in *Pauly v. Loan & Trust Co.*, 165 U. S., 624:

"Our conclusion is that the defendant in error can not be regarded otherwise than a pledgee of the stock in question, and is not a shareholder within the meaning of sec. 5151, Rev. Stat., and is not therefore subject to the liability imposed upon the shareholders of national banking associations by that section."

And as stated by Judge Shiras in *Wells v. Larrabee*, 36 Fed. Rep., 872:

"If, however, the view taken by plaintiff's counsel of the meaning of sec. 5152 is correct, it does not follow that the defendant, Larrabee, is liable. The statutory liability does not attach to him unless he is a shareholder, and upon general principles it must be held that a mere naked trustee who has no financial interest in the stock, but holds the title for the benefit of the real owner and party in interest, the existence of such trust appearing upon the corporate books, can not be held to be a shareholder within the meaning of sec. 5151, Rev. Stat."

It seems to me, therefore, these cases above cited are directly in point with the case at bar.

The case of *Holcomb, Admr., v. Gibson*, 39 W. L. B., 380, which is relied upon by counsel for the creditors, seems to me to differ materially from the case at bar in two important particulars. The first is, that the party sought to be held liable as trustee held the stock for the benefit of the corporation itself, and the syllabus in the *Gibson* case expressly

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states that "a corporation can not buy its own stock under the present constitution of Ohio." Therefore a creditor dealing with a corporation under such circumstances would see from the stock register that there was no beneficial owner who could be held liable.

Again, it seems in the Gibson case that Davis, the party who was held liable as stockholder, had voted and represented the stock in the management of the stockholders' meetings of the bank, and drew the dividends for a number of years. In this latter respect there were strong grounds of estoppel upon which the stockholder might be held liable, none of which appear in this case.

As to the motion of William M. Tugman to modify the report of the special master and referee to the extent of finding who were in fact the equitable owners of the four shares of stock standing in the name of said Tugman, my conclusion is that the motion must prevail. Tugman received the stock in question as collateral security for legal services to be rendered members of the syndicate whose names appear herein on Exhibit "C." It seems to me clear that the members of the syndicate whose names appear on Exhibit "C" should, as between themselves and Mr. Tugman, be held responsible as stockholders, and the report will therefore be modified so as to show that as between the members of said syndicate whose names appear on said Exhibit "C," and said Tugman, the former are the real beneficial owners of said four shares of stock.

As to the exceptions to the referee and special master on behalf of Valentine Boeh, my conclusion is that the exception of said Valentine Boeh must prevail. The said Boeh is found by the referee to be liable upon six shares of the capital stock of the Banner Brewing Company, whereas the fact appears to be that he subscribed for six shares of stock in the Union Banner Brewing Company, and that upon discovering this fact he entered into a verbal agreement with the company from which it is fair to infer that his stock was to be canceled, and that he was to receive beer in payment thereof. Under these circumstances, it seems to me inequitable to hold the said Boeh as a stockholder, and his exception is therefore sustained.

As to the exceptions on behalf of John Neri and Franz Pecht, based upon the ground that they subscribed for stock in the Union Banner Brewing Company, and not in the Banner Brewing Company, my conclusion is that such exceptions also must prevail. Although their names appear upon the stock book of the Banner Brewing Company, there is nothing in the evidence tending to show that they had knowledge of this fact, and knowingly permitted their names to remain upon the stock books so as to induce third parties to extend credit on the faith thereof in such wise or in such manner as would make them liable upon the principle of estoppel.

As to the exceptions on behalf of Mrs. Runnebaum, executrix of Anna Maria Kinker, my conclusion is that these exceptions must be

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overruled and the report of the referee in this respect approved and confirmed. Mrs. Kinker was the widow and sole devisee of Frank Kinker, deceased; and although she made no election to take this stock, nevertheless she did as executrix sell to herself individually the stock in question, and through her attorney made a transfer of the stock on the books of the company, and thereafter permitted her name to remain upon the books of the company as stockholder. Although the transaction by which she, as executrix, sold the stock to herself as an individual may be absolutely void as to other parties who might be interested in the stock in question, nevertheless it seems to me clear that she is bound upon the principles of estoppel. The report of the referee in this respect will be approved and confirmed.

W. M. Friedman and Wm. Worthington, for plaintiff.

Renner, Gordan & Renner, for Hoffman.

Wilby & Wald, for Tugman.

Christ. Von Seggern, for Runnebaum, Neri, Pecht and Boeh.

ACCOUNTING—ATTORNEY FEES.

[Hamilton Common Pleas, 1900.]

* **Wm. F. Wehrman v. Frank B. McFarland.**

PETITION FOR ACCOUNTING—REFUSAL TO ALLOW COUNSEL FEES.

Although the filing of a petition for an accounting and to wind up the affairs of a partnership, or syndicate, all interests being antagonistic, inures to the general benefit, and, if there was a fund in court, compensation for filing the same might be allowed, the court has no authority to require judgments against the partners to include a *pro rata* share of plaintiff's counsel fees or to render an additional judgment for the attorney fee of any one party, acting on his own behalf, merely on the ground that he initiated the proceedings.

EXCEPTIONS to report of special master.

SPIEGEL, J.

After a careful examination of the very numerous exceptions to the report of Judge Clement Bates, special master herein, both of the law involved in said exceptions and the evidence reported by the master, I can find no valid objections to his report. He has painstakingly examined every question referred to him by me after judgment rendered in this cause, and brought to bear upon them his thorough knowledge of the law and his ability to sift the evidence so as to arrive at a just conclusion upon the facts. His report will be confirmed, without going into details upon every exception raised, and the latter are overruled.

The only other question to be determined is the application for an allowance of plaintiff's attorney fees. The parties to this cause are all antagonistic; no one has done anything with the purpose of acting on behalf of all. The filing of the petition certainly does inure to the

* For decision of Spiegel, J., on the merits of the case, see 9 Dec., 400.

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general benefit; but it is the only step of that kind, and its filing was not on behalf of all, but to enforce plaintiff's individual rights. Were there a fund under the court's control, compensation for filing the petition would have been right'y allowed in accordance with the decision in Payne v. McNamara, 6 Circ. Dec., 62. But there being no funds or assets, but only personal judgments against the partners, this court can not require these judgments to include a *pro rata* share of plaintiff's counsel fees, or render an additional judgment for the attorneys' fees of any one party acting on his own behalf alone, merely on the ground—for I can find none other—that he initiated the proceedings. Indeed, to do so, would be to invite the same race for forcing such suits that has become somewhat of an abuse in partition cases.

The motion must be refused.

TAXATION.

[Fayette Common Pleas, 1900.]

G. W. PATTON, Tr., v. COMMERCIAL BANK OF MORRIS SHARP & Co.

1. UNCONSTITUTIONALITY OF SEC. 2759, REV. STAT.

To the extent that sec. 2759, Rev. Stat., relating to banks, permits cash and cash items in possession to be included in the aggregate, from which deductions of debts are to be made, it is repugnant to the constitution and void.

2. PRINCIPLE OF UNIFORMITY IN TAXATION OF BANKS.

Sections 2758 to 2769, Rev. Stat., are intended to operate uniformly and impose the same burden upon all banks and bankers, whether national or state, corporate or private; and contemplate the taxation of all banks upon the basis of their capital stock, surplus and undivided profits. But there is no constitutional requirement that property employed by bankers, of different classes, should be taxed by a uniform rule, except that each must conform to the same standard and that standard is, "the burden of taxation imposed upon the property of individuals."

3. "CASH" SYNONYMOUS WITH "MONEY."

The word "cash" is synonymous with the word "money" as used in sec. 2730, Rev. Stat., in which the meaning of the latter word is defined.

4. DEFINITIONS CANNOT CHANGE CONSTITUTIONAL MEANINGS.

The legislature, by a definition of the constitutional phrase, "property employed in banking" cannot change the meaning thereof or by such means equalize the burdens of taxation upon banks and individuals.

5. DEFINITION OF MONEY APPLIES TO BANKS.

The definition of money, as given sec. 2730, Rev. Stat., in the title on taxation, that it means "any surplus or undivided profits held by societies for saving or banks having no capital stock, gold and silver coin, bank notes of solvent banks in actual possession, and every deposit which the person owning, holding in trust or having the beneficial therein, i. entitled to withdraw on demand" applies to banks as well as individuals; under secs 2 and 3, art. 12 of the constitution, what is money if the property of an individual, for the purpose of taxation, is and must be money if the property of a bank.

6. CREDIT BALANCES WITH OTHER BANKS ARE CASH.

Credit balances which an Ohio bank has within its correspondent banks in other states, against which it may draw sight drafts, and the right of withdrawal is not subject to greater limitations than by the usages of business exist as to general deposits in banks carried by individuals, are within secs. 2730 and 2739, Rev. Stat., held to be money and taxable without deduction and should be returned as cash.

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7. GREENBACKS SHOULD BE RETURNED AS CASH.

While greenbacks are not government bonds, in the popular or proper sense, they were still non-taxable securities of the United States and banks were, prior to August 13, 1894, entitled to exclude them from the monthly average of cash returned for taxation. Subsequent to that date, by act of congress, their privilege of exemption was taken away, and they should now be returned with the average amount of cash for taxation.

8. CONGRESS HAD POWER TO WITHDRAW EXEMPTION.

The provisions of the federal constitution prohibiting laws impairing the obligations of contracts does not operate to deprive congress of the power to withdraw the quality of exemption from taxation from greenbacks. The act of August 13, 1894, for such purpose, relates to such notes only as are "payable on demand and circulating or intended to circulate as currency; and as long as the holder can on demand obtain the money promised in the note, the government fully keeps the contract."

9. RETURNS INCORRECT BUT NOT FALSE.

A failure by a bank to return balances in the hands of other banks as "cash," as required by the force of the definition of "money" in sec. 2730, Rev. Stat., above referred to, and, without intent to deceive, following an established custom among banks, returning same as "bills receivable," which would be correct but for the statutory definition referred to, does not constitute a false return within the meaning of the word "false" as defined in *Ratterman v. Ingalls*, 48 Ohio St., 468; such returns are incorrect.

10. CULPABLE NEGLIGENCE MAKES RETURN FALSE.

Culpable negligence, in making returns of property for taxation, though there be no design to mislead and deceive, is sufficient to make a return "false."

11. FAILURE TO RELIEVE FROM CHARGE OF NEGLIGENCE.

Where the president of a bank, being required to exercise diligence in matters relating to taxation, and having failed to return greenbacks for taxation, admitted that some rumor of the repeal of the law granting immunity from state taxation to greenbacks had reached him, the fact that he wrote to the representative from his district in the state legislature as to whether the general assembly of Ohio had repealed a law of congress, is not diligence in acquiring knowledge from sources where information is obtainable, which will relieve such president from the imputation of culpable negligence or a false return.

12. RULE AS TO INQUIRY.

Although the court is of the opinion that a reasonable construction of secs. 2781 and 2782, Rev. Stat., would not limit the investigation to the current year in case of merely incorrect returns and extend it to a period of five years in case of false returns, it is so held, on the authority of *Ratterman v. Ingalls*, 48 Ohio St., 468, and *Probasco v. Raine*, 50 Ohio St., 378.

13. INQUIRY IN CASE OF FALSE RETURNS—SCOPE OF.

The conditions of falsity which authorize the auditor to go back of the current year being found to exist, he may inquire into all matters touching the correctness of the returns and bring upon the duplicate all the taxes which the party making the return justly owed for that year, adding a penalty of fifty per cent. upon such items only as are found to have been falsely omitted.

HIDY, J.

The pleadings and testimony in this case disclose that in October, 1897, the auditor of Fayette county made additions, to the tax duplicate, for taxation, against the defendant, of large sums, for the years 1892, 1893, 1894, 1895, 1896 and 1897, adding thereto a penalty of fifty per cent., and entering the taxes at the current rate, for each year on the amounts thus increased.

The action as made by the petition with its amendments is for these taxes, for all the years except the last.

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The claim made by the plaintiff is that the defendant for each of these years, in making its returns to the auditor, returned large sums under item 2 of its return as "accounts receivable" which should have been returned under item 3, as "cash and cash items."

It is further claimed that the books of the defendant were so manipulated as to show an amount of cash, less than the true amount, on hand on the first Monday of each month, from which the average for the year is ascertained for the purpose of taxation.

It appears from the evidence that the average amount of cash and cash items, if ascertained from the showing made by defendant's books on the Saturday preceding the first Monday of each month, would be much greater than if ascertained from the showing made on the following Monday.

This discrepancy is shown to arise, in part, from the custom of the bank in carrying as cash orders against various funds on deposit in the bank, during the month, and charging the same to the proper accounts on the Saturday preceding the first Monday of each month; and in part, by assorting the currency on hand, selecting out all "greenbacks," and on the Saturday preceding the first Mondays—charging these "greenbacks" to an account carried on its books as "U. S. Government Bonds."

The questions presented, are :

First—Are these amounts returned as "accounts receivable" properly such, or are they to be treated as cash for the purposes of taxation.

Second—Were the "greenbacks," thus carried and returned by defendant as "Government Bonds," subject to taxation during any of these years.

Third—Should the orders carried as cash during the month, and charged to the proper accounts on the Saturdays preceding the first Mondays, be included in item 3 of the return as "cash items."

The determination of these questions involves an examination of the whole system of taxation in this state, as gathered from the constitution, and the various legislative enactments.

Counsel for defendant has, with great ingenuity and ability, developed, in argument, the proposition, that the legislative scheme for the taxation of banks and bankers, first adopted in the act of April 16, 1867, and now embodied in secs. 2758 to 2769, Rev. Stat., was intended to operate uniformly, and impose the same burden upon all banks and bankers, whether national or state, corporate or private, and that this scheme contemplates the taxation of all banks upon the basis of their capital stock, surplus and undivided profits.

The argument for this proposition is strong and I believe sound.

Whether we look to the history of legislation on the subject, since the adoption of our present constitution, or consider the inherent justice

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and propriety of imposing an equal burden of taxation upon all classes of banks; as well as the constitutional mandate upon the legislature that it shall pass laws "taxing by a uniform rule" all property according to its true value in money, no reason is perceived for supposing that the legislature intended by the act of 1867, to discriminate against the private banker in favor of the holder of stock in an incorporated bank. It is beyond doubt that the method of valuation of shares, in incorporated banks, adopted by our statutes, practically results in the taxation of such banks upon their capital and surplus, and nothing more, and consequently that the provisions of sec. 2759, Rev. Stat., relating to unincorporated banks and bankers, was intended to effect the same result as to them.

Counsel for defendant in his brief has by an application of the scheme of valuation adopted in sec. 2759, to the returns made by the defendant bank during the years here in controversy, shown that in practice this section does have the effect to tax such banks upon their capital and surplus, the same as incorporated banks are taxed.

I think the position of counsel as to the legislative intent, to tax all capital employed in banking by a uniform rule, is sustained also by authority in Chapman v. National Bank, 56 Ohio St., 310, and perhaps other decisions by our Supreme Court.

But conceding all that is claimed by counsel in this regard, his proposition by no means furnishes a solution of the questions involved in this case.

The legislature has not constitutional authority to adopt any scheme it may devise for the taxation of banks, provided only that the law imposes a uniform burden upon banks of all kinds.

A law perfectly just and fair in its application, between banks of different kinds, may be perfectly vicious in its results, when the methods of valuation adopted for property otherwise employed, is considered, and it may also violate the constitution.

There is no constitutional requirement that property employed by bankers, of different classes, should be taxed by a uniform rule, except that each must conform to the same standard, and that standard is, the "burden of taxation imposed on the property of individuals."

Section 3, art. 12, of the constitution provides: "The general assembly shall provide, by law, for taxing the notes, and bills discounted or purchased, moneys loaned, and all other property, effects, or dues, of every description (without deduction) of all banks, now existing, or hereafter created, and of all bankers, so that all property employed in banking, shall always bear a burden of taxation equal to that imposed on the property of individuals."

The question to be considered then, is not whether the provisions of sec. 2759, Rev. Stat., impose upon unincorporated banks a burden of taxation equal to that imposed by secs. 2762-2766, Rev. Stat., upon the

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shares of incorporated banking companies, state and national, but whether sec. 2659, Rev. Stat., imposes upon property employed in banking by unincorporated banks a burden of taxation equal to that imposed by other sections of the statutes on the property of individuals.

It is urged that substantial equality, in this regard, is attained by sec. 2759, Rev. Stat., because the practical result of that section is to tax banks upon their capital and surplus—in other words, upon what the bank is worth, and this is in accordance with the general policy of our system of taxation; that perfect equality can not be attained in practice, but that the constitutional requirement is fully met if the plan adopted conforms to this general policy.

The contention of counsel, that it is the general policy of this state, to tax its citizens upon what they are worth, is supported by a *dictum* of Judge Welch, in *Frazer v. Siebern*, 16 Ohio St., 614–624, where he says:

“ It is the unmistakable intention manifested in our tax legislation for the last twenty years—the central idea of our system of general *ad valorem* taxation—to tax every person upon what he is worth.”

However correct this *dictum* of Judge Welch may be in its interpretation of the spirit of our tax legislation for the past twenty years, it is not a correct statement of the spirit of our constitution on the same subject, and but serves to illustrate how far our legislation has departed from the spirit of the constitution, during the period mentioned.

In *Exchange Bank v. Hines*, 3 Ohio St., 40, Judge Thurman said:

“ The idea of the constitution is not that each man shall be taxed upon exactly what he is worth. That is a favorite idea of some political economists, but it finds no place in our constitution. The objects of taxation declared in that instrument are the real and personal property and choses in action in the state.”

Counsel for defendant must concede that the scheme of taxation contained in sec. 2759, Rev. Stat., allows unincorporated banks to deduct their debts from their cash, and their stocks and bonds, while individuals are not by other sections of the statute permitted to do this; but to escape the conclusion of inequality which would seem to follow, a very plausible argument is put forward, viz:

The provisions of the constitution upon the subject of taxation do not execute themselves. Taxation is wholly a legislative function. The legislature is competent to define the objects of taxation.

The constitutional requirement is that “ all property employed in banking, shall always bear a burden of taxation equal to that imposed on the property of individuals.” The legislature is competent to define the phrase, “ property employed in banking ” used in the constitution, and has done so, by the provisions of secs. 2759, 2766, Rev. Stat., that definition being in effect that “ property employed in banking ” means the capital and surplus of the bank; and this being taxed at the same

rate as the property of individuals, meets all the constitutional requirements.

Something more than mere plausibility is perhaps given to this argument, by the reasoning of Judge Dickman, in *Treasurer v. Bank*, 47 Ohio St., 503 521, where the judge would seem to hold that after the Supreme Court of the state had exercised its function of constitutional interpretation, the legislature is still competent to veto this interpretation by a legislative definition of the term "credits." But I confess a partiality for the sturdier doctrine of McIlvaine, J., in *Payne v. Watter-son*, 37 Ohio St., 125, where he said—"that the legislature cannot by improvising definitions, change the meaning of constitutional provisions."

I conclude that, however ingeniously and unsuccessfully the legislature may have by a definition of the constitutional phrase "property employed in banking" attempted to equalize the burdens of taxation upon all classes of banks, yet they cannot thereby change the meaning of the constitutional provision, which clearly intended that everything which is regarded by the constitution as property—whether lands, moneys, credits, stocks or bonds, should be taxed wherever found, whether in the hands of a bank or an individual.

That this result is not attained by sec. 2759, Rev. Stat., is too clear for argument, and if to so hold would be to derange the legislative scheme for taxing banking institutions, so that unincorporated banks are made to bear a greater burden of taxation than incorporated banks, it may call for judicial inquiry as to the constitutionality of the statutes whereby incorporated banks are permitted to escape taxation on their moneys, stocks and bonds, but cannot stay the hand of the courts in the discharge of their duty to sustain the constitution as the supreme law of the state.

I have gone so far into a discussion of the constitutionality of sec. 2759, Rev. Stat., as a whole in deference to the learning and ability with which counsel have presented anew the arguments to sustain it.

But it was probably not necessary to have indulged such a discussion, as in my view, I am not called upon by the facts in this case to go beyond what is already decided as to the constitutionality of that section by the Supreme Court in *Treasurer v. Bank*, 47 Ohio St., 503.

It was held in that case, that to the extent that sec. 2759, Rev. Stat., permits cash and cash items in possession to be included in the aggregate from which deductions of debts are to be made, it is repugnant to the constitution and void.

I would of course be bound to accept this decision as law, even if it did not meet my approval—which it does fully.

I am not called upon here to go beyond this decision, so as to withdraw other items from the aggregate, from which deductions may be made.

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I am simply called upon to say what is "cash and cash items" from which deductions may not be made.

I think that the term "cash" may reasonably be held to be synonymous with the term "money" employed in the statute. The term "money" or "moneys," is by sec. 2730, Rev. Stat., defined to mean and include in the title on taxation, "any surplus or undivided profits held by societies for saving, or banks having no capital stock, gold and silver coin, bank notes of solvent banks in actual possession, and every deposit which the person owning, holding in trust or having the beneficial interest therein, is entitled to withdraw in money on demand."

There is no suggestion here that this definition is not to apply to banks as well as individuals, but even if there were doubt as to the intention in this regard, I am convinced that the legislature is wholly incompetent, to so discriminate, by definition, in favor of banks and against individuals: "that the legislature can not by improvising definitions, change the meaning of constitutional provisions;" that under secs. 2 and 3, art. 12, of the constitution, what is money if the property of an individual, for the purposes of taxation, is, and must be, money if the property of a bank.

Applying this rule, shall we say that the property mentioned in item 2 of defendant's return, for the several years in question, was correctly returned, as "accounts receivable" and therefore subject to deductions, or should it have been returned as "cash" or "money"—and have been taxed without deduction?

There is no dispute, in evidence, as to what made up this item. It is admitted to represent the credit balances which the defendant had with its correspondent banks in Cincinnati and New York. Nor do I think there is much practical difference between witnesses as to the character and incidents of these deposits. An attempt is made by some of the witnesses to claim that these balances were not subject to be withdrawn in money on demand, at least not to the full amount; but all admit that these balances were the funds against which the bank did habitually draw its sight drafts, which were always paid, and I am satisfied from the evidence that the right of the defendant bank to withdraw these balances on demand, was not subject to any greater limitations, than by the usages of business exist as to the general deposits in banks carried by individuals. These latter as we know are, within the provisions of secs. 2730 and 2739, Rev. Stat., held in practice to be "money," and as I think, the balances of defendant in its correspondent banks, must likewise be so held, and are therefore taxable without deduction.

The other principal question in the case relates to the taxability of the socalled "greenbacks," held by the defendant bank.

It appears from the evidence that for many years prior to the years here involved, the defendant bank carried in its books an account which was denominated "U. S. Government Bonds;" that in fact the defend-

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ant did not during any of these years own any "Government Bonds" as that term is usually understood.

That it was the custom of the bank to assort the currency paid in by its customers, selecting out all the greenbacks and treasury notes, and holding these in separate packages among its cash until the Saturday preceding the first Monday of each month, when they were charged to the "Government Bond" account, the cash in the bank being thereby apparently reduced by this amount and "Government Bonds" increased.

As often as the exigencies of the business demanded, part of this currency was withdrawn from the "Government Bond," account, and was again carried as cash until the Saturday preceding the first Monday in the next month, when it was again charged to "Government Bonds," and the cash again reduced.

The so-called "Government Bonds" entered into the defendant's returns for taxation; going to swell item 4 of said returns, and again appearing in item 8 thereof. But as item 4 is increased by this course, precisely as much as it is decreased by item 8 in making the deductions prescribed by statute, the transaction is self-cancelling, and has no effect on the amount of stocks, bonds, etc., upon which the defendant is taxable.

But it does affect in a very important way the defendant's assessment for taxation, in this, that it reduces the average amount of "cash and cash items"—returned under item 3—of the return. By this device of book-keeping the average amount of cash returned is less by a sum equal to the average amount of government bonds. In other words, item 8 should be increased by the amount of item 8, to show the true average amount of cash and cash items, of the bank during any year.

The question for solution is whether the defendant was entitled to the deduction from its average amount of cash, of the average amount of greenbanks, secured by the method here indicated.

It is conceded by counsel for plaintiff that greenbacks were by the terms of sec. 3701, U. S. Rev. Stat., not subject to state taxation prior to August 13, 1894, when this quality of non-taxability was taken from them by federal legislation. But it is contended, nevertheless, that in taxing banks, legal tenders received and employed in current business are not to be excluded from taxation.

In support of this proposition is cited *Canal & Banking Co. v. New Orleans*, 29 La. An., 857, and affirmed by the Supreme Court of the United States in 99 U. S., 97.

I am unable to agree with counsel as to the doctrine of that case.

I think the principle therein decided has no application to a case where the tax is levied not on the capital of the bank, but upon its property, as we have already determined is the case under sec. 2759, Rev. Stat., as modified by *Treasurer v. Bank*, *supra*.

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The statute of Louisiana under which the tax in that case was levied, is not given in the report, but it is evident from the language of the opinions and the point decided that the statute authorized the levy of a tax upon the value of its capital, and not upon the specific property, which the bank might be found to own at various periods during the year. The language employed in one section of the syllabus is—"While the ordinary deposits of United States currency (or national bank notes) in a bank by its customers, enter into, and form a part of its assets, they at the same time create liabilities of the bank, and thus offset themselves as assets. Such deposits, therefore, do not constitute a portion of the capital of a bank, and hence the bank cannot claim that its capital shall be exempt from taxation to the amount of such deposits.

And again—"The mere fact that at various periods during the year the tax is assessed, the bank "held" large amounts in United States currency, will not exempt its capital from taxation to the extent of those amounts, unless the bank proves that the currency so 'held' was a part of its capital."

It is clearly inferable from this language that even where the tax is assessed upon the capital of a bank, greenbacks might be deducted from the capital, if it were made to appear that they were part of the capital; all that is decided is, that when taken in as ordinary deposits from customers of the bank, they do not form part of the capital, but are offset by the liability to the depositor created in the same transaction.

But the case furnishes no authority for the proposition that where by the constitution and laws of the state, a bank is taxed not upon its capital, but like individuals upon the specific property which it may have in possession at a definite period or periods during the year, it may not, like individuals, deduct from money on hand, greenbacks or other non-taxable moneys of the United States.

To hold that it might not make such deductions would, in my opinion, be to subject property employed in banking to a greater burden of taxation than is imposed upon the property of individuals, in contravention of sec. 3, art. 12, of the constitution.

I hold, therefore, that while these greenbacks of the defendant were not "Government Bonds" in the popular or perhaps in any proper sense, and were improperly so called in the book-keeping of defendant, still they were non-taxable securities of the United States, and the defendant, was entitled to exclude them from the monthly average of cash, in its return for taxation; and the system of book-keeping adopted, enabled the defendant to state accurately what part of its cash moneys was on the first Monday of each month, non-taxable, and thus to make a perfectly correct report of the average of taxable cash on hand for the year.

There is, in the transaction, no fraud upon the revenues of the state by converting into non-taxable securities what was before taxable, and

holding them in the non-taxable form during the days from which the yearly average is determined. They were equally non-taxable whether greenbacks or government bonds, and practically all the defendant did in preparation for tax-day was to count them and make on its books the deductions it was legally entitled to make. What has been said with reference to the greenbacks, applies of course to the situation prior to August 13, 1894.

Subsequent to that date, by act of congress, their privilege of exemption from state taxation was taken away, and it was provided "That circulating notes of national banking associations, and United States legal tender notes and other notes and certificates of the United States, payable on demand and circulating or intended to circulate as currency and gold, silver and other coin, shall be subject to taxation as money on hand or on deposit under the laws of any state or territory."

It is urged by counsel for defendant, that when congress authorized the issue of these notes, it was an exercise of its power to borrow money on the credit of the United States. That the promise to pay which they contain, was a contract, and that one of the conditions of the contract, embodied in the statute authorizing their issue was, that they should not be subject to taxation by the state. That the provision of the federal constitution prohibiting laws impairing the obligation of contracts, operates to deprive congress of power to withdraw this quality of immunity from taxation, so long as the notes remain outstanding.

Whatever may be the limitation on the power of congress, in this regard, as affecting interest bearing time obligations of the United States, I think there can be no doubt of its power, to do all that it attempted to do in this act of August 13, 1894.

The act only relates to such notes as are "payable on demand and circulating or intended to circulate as currency."

As long as the holder can "on demand" obtain the money promised in the note, I think the government has fully kept the terms of the contract. The holder who can at any time enforce their redemption in money is not prejudiced by the legislation.

It follows that for the years 1895 and 1896 the cash returned by the defendant for taxation should be increased by the average amount of "U. S. Government Bonds" on hand during the preceding year, as shown by the return made.

The books of defendant show a discrepancy between the apparent cash on hand on the first Monday of each month, and the apparent cash on the preceding Saturday, not fully accounted for by the deduction of greenbacks already referred to.

This discrepancy is shown by the evidence to arise from the course of dealing adopted by the bank, with its customers.

It carried accounts with various public officers and treasurers of private institutions, having the custody of funds, and it was the habit to

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pay orders drawn against such funds, and carry them in cash, until the end of the month, when they were taken up by the officer's check, which was charged to his account. This was usually done on the Saturday preceding the first Monday of each month, and had the effect to greatly reduce the apparent amount of cash, on the latter day, as compared with the former.

I think this transaction perfectly legitimate, and in no wise prejudicial to the rights of the public. Such orders, so carried, were in no sense cash, nor probably cash items, and were not taxable as such.

What has been said as to the so-called "accounts receivable" and "greenbacks," relates to their taxability during the years here in question. But there are still other considerations affecting the right of the plaintiff to recover in this action.

First. Were the returns made by the defendant for these several years "false," within the meaning of sec. 2781, Rev. Stat., as construed in Ratterman v. Ingalls, 48 Ohio St., 468?

Second. If they were not "false returns" as that term is construed by the Supreme Court, but were still incorrect, has the county auditor a right, under secs. 2781 or 2782, Rev. Stat., to correct the duplicate, adding simple taxes without penalty—back of the current year?

I have already indicated that in my opinion the defendant's returns were during all these years incorrect. That for the years 1892, 1893, and 1894, the amount of taxable cash returned by the defendant should have been increased by the amount returned as "accounts receivable"—and for the years 1895 and 1896 the taxable cash should have been increased by the amount returned as "accounts receivable" and the amount returned as "U. S. Government Bonds," but it does not follow that these returns were "false" because incorrect.

For many reasons I hesitate to find that the defendant's returns for 1892, 1893 and 1894, which are only incorrect in that they classify amounts due from banks and bankers subject to withdrawal on demand as "accounts receivable" instead of "money" or "cash," were "false returns," within the meaning given the word "false" in Ratterman v. Ingalls, *supra*.

In the first place, I think these balances due from banks and bankers, are in fact "accounts receivable," as that term is understood among accountants generally. The balances which individuals may have on deposit with their bankers, are likewise "accounts receivable." It is well settled that a deposit in bank creates the relation of a debtor and creditor; the bank owes its depositor and owes him upon "account," and this I think is all that is necessary to create an "account receivable" in the hands of the creditor.

It is only by force of the definition of "money" contained in sec. 2780, Rev. Stat., that the individual is required to return such balances as "cash" for the purposes of taxation. And it is only by force of the

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constitutional requirement that taxes shall be levied by uniform rule and that property employed in banking shall bear a burden of taxation equal to that imposed on the property of individuals, that banks are, in my opinion, required to return such balances as "cash," and that they are taxable as such.

Again it is shown by the testimony that banks in this locality generally, if not throughout the state have, for the purposes of taxation, habitually returned such balances as "accounts receivable," and not as "cash." And since the decision of *P. & D. Bank v. Patton*, Tr., 52 Ohio St., 603, in October, 1894, there has been apparent authority for the assumption that such balances were not taxable without deduction as cash. It is true that, in my judgment, that case, because the facts found by the court, and which furnished the basis of the decision, did not show that the balances were subject to be withdrawn on demand, does not sustain the assumption, but a point so technical that it evidently escaped the attention of counsel for the treasurer in preparing the finding of facts ought not to subject the mere layman to penalties if it escaped his attention.

Under all these circumstances I am not prepared to find that the defendant's returns for the years 1892, 1893 and 1894 were "false returns," as that term is construed in *Ratterman v. Ingalls*, 48 Ohio St., 468; nor do I find that the returns for 1895 and 1896 were "false returns" in so far as they were affected by the classification of these balances, as "accounts receivable" instead of cash; they are simply incorrect.

The returns for 1895 and 1896, however, are also affected by the classification of "greenbacks," as "U. S. Government Bonds," and I think the course of the defendant in making such a classification wholly inexcusable. In the case of balances in the hands of other banks, the defendant may be excused for adopting the classification usual among accountants and calling them "accounts receivable;" but in the case of the "greenbacks" it took precisely the opposite course, and designated them in terms not usually employed for that purpose, and well calculated to deceive the auditor as to their true character. This evidence of an active intent to deceive may very well be said to be rebutted by the fact that the same classification had been adopted by the defendant long before, and during years when such securities were not taxable, and when consequently no fraud on the revenues of the state could possibly result from it.

But culpable negligence is sufficient, though there may be no design to mislead and deceive, to make a return "false."

In *Ratterman v. Ingalls*, *supra*, the Supreme Court said: "It is the duty of the resident property owner to return his taxable property for taxation. In the performance of this duty he must use diligence and care in acquiring knowledge from sources where information is obtainable. If he uses such care and acts honestly, making his return

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in accordance with his best knowledge and belief, after using all reasonable means to obtain an intelligent belief, his return will not be false within the meaning of sec. 2781. But this belief must result from a careful effort to perform the duty. Blind reliance upon an indolent belief that one's property is not taxable, without investigation, inquiry or disclosure, to the taxing officer, would show culpable negligence, as fatal to the claim of good faith and innocent purpose as would a direct intent to deceive."

The president of the defendant bank admits that some rumor of the repeal of the law granting immunity from state taxation to "greenbacks" reached his ears, and he says he wrote to our member of the general assembly to know if such a law had been passed. That the member from Fayette informed him that such a measure had been introduced in the general assembly of Ohio, but so far as he knew had never been passed.

I am not prepared to say that an inquiry of a member of the legislature as to whether the general assembly of Ohio had repealed a law of congress, is due diligence in acquiring knowledge from sources where information is obtainable, which ought to relieve the defendant from imputation of culpable negligence, and I therefore hold the defendant's returns for 1895 and 1896 to be false returns in so far as relates to the return of "greenbacks" as U. S. Government Bonds."

The next question that arises is, what authority had the auditor in 1897 to correct the duplicates for the years 1892, 1893 and 1894, as to which years I have found that defendant's returns are incorrect but not "false?"

After a careful examination of the decisions of the Supreme Court upon the question I have been forced to a conclusion, contrary to what seems to me to be the spirit and purpose of secs. 2781 and 2782, Rev. Stat.

An examination of those sections will show that sec. 2781, Rev. Stat., gives authority to the auditor to go back five years beyond the current year to correct the duplicates by bringing upon them the omitted returns taxes, together with penalties. But this section seems to relate alone to which are "false," not simply incorrect.

Section 2782, Rev. Stat., relates to returns which are incorrect as well as such as are "false," but this section only authorizes the auditor to correct the duplicate for the current year.

The letter of these sections, then, apparently limits the authority of the auditor to the making of corrections for the current year, except in cases where the return made is "false" as well as incorrect.

But it has been held that these sections do not create obligations against the taxpayer; they are only a remedy for the collection of what he already owes, to-wit, the taxes on all his property, for every year, whether the same was returned for taxation or not. Sturges v. Carter,

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114 U. S., 511; *Lee v. Sturges*, 46 Ohio St., 153; *State ex rel. v. Raine*, 47 Ohio St., 447; *Gager v. Prout*, 48 Ohio St., 89.

Assuming, then, that the defendant owes to the treasurer the simple taxes on the property which it did not return for the years 1892, 1893 and 1894, just as it owed the taxes on what it did return; and that secs. 2781 and 2782, Rev. Stat., were intended to give a remedy for the collection of this debt, it seems to me that a fair and reasonable construction of these sections would not limit their application to the current year in case of merely incorrect returns, and extend it to a period of five years back of the current year in case of "false" return.

Such a construction, it seems to me, makes the primary purpose of the statute penal instead of remedial; it gives a scope of six years to the auditor's authority where somebody is to be punished by the imposition of a penalty, but limits his authority to one year, where the only result is to subserve the interest of the public treasury.

The Supreme Court seems to have expressly rejected such an interpretation of these sections, in *Gager v. Prout*, 48 Ohio St., 89; Minshall, J., there says :

"It cannot be claimed with any show of reason, that the legislature would not have provided for making the addition of the amount omitted, without the addition of a penalty also. To so hold would be to disregard all known motives of human conduct, and to say, that an entire body of intelligent men would be governed by mere caprice instead of the interest of their constituents; or rather by a desire to make the delinquent property holder smart, than to subserve the interests of the public treasury."

While this language was not so applied by Judge Minshall, it seems to me to be justly applicable to a construction of these sections which limits the authority of the auditor to make additions, back of the current year to cases where a penalty might be added, and forbids him to bring upon the duplicates simple taxes justly due the state, merely because there was no element of deceit or culpability in their omission.

So that in the absence of a contrary holding by the Supreme Court I would be inclined to the opinion that for the years 1892, 1893 and 1894, the auditor might place upon the duplicate the simple taxes without penalty, and that the treasurer might recover for the same in this action.

But I think the Supreme Court has in a number of cases held the contrary.

This holding is not so apparent from what is said in opinions rendered, as from the judgments awarded.

In *Ratterman v. Ingalls*, 48 Ohio St., 468, the action was brought by the treasurer to recover taxes charged by the auditor against Ingalls for the years 1881 to 1886 inclusive with a penalty of fifty per cent. for the year 1886. These additions were made for stock of the C. I. St. L. & C. Railroad Company, omitted in defendant's return. Upon trial in the

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superior court of Cincinnati judgment was rendered for the defendant as to amounts claimed for the years 1881 to 1885 inclusive, and judgment for plaintiff for amount claimed for 1886. Upon hearing in the Supreme Court, and finding that the return for 1886 was "false," and the returns for the years 1881 to 1885 were simply incorrect, the judgment of the superior court was affirmed.

In *Probasco v. Raine*, 50 Ohio St., 378, the action was brought against the auditor to enjoin him from placing on the duplicate taxes for the year 1881 to 1886 inclusive, on certain omitted railroad stock. The case was tried on an agreed statement of facts in the superior court of Cincinnati, where the auditor was ordered to place the taxes on the duplicate, with fifty per cent. penalty for 1886. The Supreme Court reversed the judgment on the ground that the defendant's return was not "false," within the meaning of that term, as defined in *Ratterman v. Ingalls*, 48 O. S., 468, and entered judgment enjoining the auditor as prayed for in the petition.

In *Patton, Tr., v. Commercial Bank*, the suit was for simple taxes without penalty, for the years 1891, 1892, 1893 and 1894. The corrections of the duplicate were made during the current years for 1893 and 1894; and after the current years for 1891 and 1892.

The circuit court gave judgment for the amount of taxes for 1893 and 1894 only, and this was affirmed by the Supreme Court.

The judgments in these various cases could only have been rendered as they were rendered, upon the theory that the auditor only had authority to make corrections of the duplicate back of the current year in cases where the returns were "false" and not merely incorrect. So that I hold upon authority of these cases—that the judgment must here be for the defendant for the taxes claimed for the years 1892 to 1894 inclusive.

It would follow from what has already been said that judgment should be given for the plaintiff for the taxes with penalty, upon the greenbacks held by the defendant in the years 1895 and 1896.

But one other question of some difficulty remains. Having found that the returns for 1895 and 1896 were false, as to the "greenbacks" and incorrect as to the "accounts receivable"—the auditor having authority, under sec. 2781, Rev., Stat. to correct in 1897 the duplicates for the preceding years 1895 and 1896, must his corrections be limited to particulars in which the returns are found to be "false," or may he also include in his corrections particulars as to which the returns were merely incorrect?

I think in view of the decision of the Supreme Court in *Ratterman v. Ingalls, supra*, he would not be warranted in imposing the penalty upon amounts omitted from the return without an intent to deceive or culpable negligence.

And the circuit court of Hamilton county has held in *Phipps v. Ratterman*, 6 Circ. Dec., 488, that he may not even add to the duplicate, the simple taxes on amounts as to which the return is merely incorrect, thought here turn may be false in other particulars; that he may add the taxes and penalty as to items falsely withheld from the return, but must entirely ignore matters innocently omitted.

I have already said that it is only because I am bound to respect the decisions of the Supreme Court that I hold that the auditor cannot make additions of simple taxes back of the current year, when the returns are not in any part false. Unsatisfactory as that conclusion is to me, I do not feel disposed to extend the doctrine any further than compelled by the highest judicial authority of the state. And notwithstanding the decision of the Hamilton circuit court I am of opinion that the conditions of falsity which authorize the auditor to go back of the current year, being found to exist, he may inquire into all matters touching the correctness of the returns, and bring upon the duplicate all the taxes, which the party making the return justly owed for that year, adding a penalty of fifty per cent. upon such items only as are found to have been "falsely" omitted.

This rule applied to the case at bar would require additions to the duplicate against the defendant of taxes on property as follows, for 1895:

Greenbacks	\$21,416 67
Added for penalty.....	10,708 83
Accounts receivable.....	78,910 28
	<hr/>
Total additions	\$111,035 28
This sum multiplied by the rate 29.4 mills gives the taxes for 1895 to be added	3,264 43

1896:

Greenbacks	\$13,666 66
Added for penalty.....	6,833 33
Account receivable.....	43,401 80
	<hr/>
Total addition	\$63,901 80
This sum multiplied by the rate for the year, viz. 32 mills, gives the taxes for 1896 to be added.....	\$2,044 85
Taxes for 1895 brought forward	3,264 43
	<hr/>
Total taxes.....	\$5,309 25
Add 5 per cent. penalty to simple taxes.....	258 79
	<hr/>
Total for which judgment is awarded.....	\$5,548 07

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MUNICIPAL CORPORATION—BUILDING.

[Cuyahoga Common Pleas, 1900.]

* **BEDFORD (VIL.) V. LEVERETT TARBELL ET AL.**

1. PETITION FOR BLOCKING SQUARES JURISDICTIONAL.

The provisions of sec. 2473, Rev. Stat., requiring the owners of two-thirds of the ground of a square to petition for an ordinance blocking such square against the erection of wooden buildings, are jurisdictional and without such a petition the council has no right to act.

2. WIDOW MAY PETITION TO EXTENT OF DOWER INTEREST.

A widow owning a dower interest in such a square, is an owner within the meaning of the statute to the extent of such interest and may petition therefor; but such widow has no right to sign for the remainder of the property.

3. CHARACTER OF BUILDINGS PROHIBITED.

Section 2473, Rev. Stat., permitting municipal councils, upon proper petition, to pass ordinances prohibiting the erection of wooden buildings whose outer walls are not of iron, stone, brick, cement or mortar, or some of them, does not authorize an ordinance prohibiting the erection of "any wooden building" and an ordinance to that effect is void.

4. SIGNING AND FILING PETITION NOT ESTOPPEL.

A property owner is not estopped from contesting the validity of such ordinance, on any ground, by having signed and filed the petition therefor.

LAMPSON, J.

This action was brought by the incorporated village of Bedford, this county, against Leverett Tarbell and E. L. Foster as defendants, to restrain them from erecting a certain building in the village of Bedford, on Main street, claiming that the same was in violation of a certain ordinance which had been passed by the village council blocking that portion of the village and providing for fire limits there, under a statute which authorized them to do so. The ordinance is as follows:

"Bedford, Ohio, Oct. 25, 1893. Ordinance to block square: Whereas, a petition signed by the owners of two-thirds of the real estate on the square bounded by Main, Willis and North Park streets, has been presented to the council, praying for the blocking of said square against the erection of wooden buildings thereon above the height of ten feet, and a plat of said square has been filed with the village clerk, therefore, section 1—Be it ordained by the village council of the incorporated village of Bedford, that the said square be, and the same is hereby declared blocked, and the erection of any wooden buildings thereon of more than ten feet in height is hereby prohibited. Section 2—And this ordinance to be in force and take effect from and after its passage and legal publication."

The ordinance was passed October 25, 1893, and was published for the required length of time in the paper of general circulation in the village.

* For a later decision in suit on injunction bond, by Strimple, J., in this case, see *post*, 346.

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The section of the statute under which the council attempt to act in this matter is sec. 2473, Rev. Stat. "To regulate the erection of structures, etc."

"The council shall have power to regulate the erection of houses and business structures, and on the petition of the owners of not less than two-thirds of the ground included in any square or half square, prohibit the erection on any such square of any building, or addition to any building, more than ten feet high, unless the outer walls be made of iron, stone, brick, and mortar, or of some of them, and to provide for the removal of any building or additions erected contrary to such prohibition."

There are several questions in this case, before we get to the one upon which I shall decide it; but I will only just simply suggest them. There is one question that is right at the outset, whether or not the remedy by injunction is the proper remedy in this case; whether or not that is a method which courts have any right to enforce, or whether that is the proper method of enforcing provisions of that kind. But as I have that question involved in a much more serious case than this, and as it was not argued, I will not say anything on the subject. But I will simply say that in my judgment that is one of the important questions in the case.

The provision of the statute is, first, that the owners of not less than two-thirds of the ground included in any square, may petition, etc. That provision is jurisdictional, and that petition of the owners must exist before the council has a right to act. Without any objection to the testimony, the issue taken upon this petition was one broad enough, by the answer, to bring in question the validity of this ordinance, and some testimony was given upon that point.

It appears that the whole number of feet in this square thus blocked by this ordinance was 113,400 square feet. Two-thirds of that would be 75,600 square feet. Of this number 16,928 square feet were signed by the railroad company, by the general manager, Mr. Wardwell, who was also at the same time one of the receivers. And it is claimed that he had no authority thus to act under his powers as receiver. Well, at the time it did not strike me very seriously; but the more I have looked at it the more seriously I have doubt as to his authority to sign for the railroad company a grant of that kind. It affects what might be a valuable privilege, what might be a serious impairment of a right. The statute says the owner must sign; and while I do not suppose it means by that one who has the absolute, complete, unrestricted ownership, I suppose it means one who has such power and control over it that he has the right, at least for the time being, to qualify, modify, and restrict by his act in a legal way the use of that property.

Eight thousand seven hundred and eighty square feet was signed by Mrs. Comstock. While the records were not produced, without any objection, the testimony went in and it was so considered that she was the

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widow of Mr. A. H. Comstock, deceased, who died seized of the legal title of this property, being the homestead, she occupying it at the time and undoubtedly having her dower interest. I do think that as to her dower interest she was the owner in the sense provided by the statute, and had the right to sign it. But I cannot see how, on the testimony, she had any right as to the other two-thirds. She was not the owner; she did not on the face of the petition seek to sign as agent. There was no testimony showing that she had any authority from the heirs to sign for them. And while I can perfectly well imagine that it would be perfectly in harmony with their wishes, yet in the absence of any testimony authorizing her to represent them, I think the court must come to the conclusion that she signed simply for herself, to the extent to which she had any power to bind or affect that property. That would leave less than two-thirds of this property.

It is said as to Mr. Tarbell, that he signed the petition and presented it himself. Mr. Foster did not. I do not think in a matter of this kind that that is sufficient. This is a jurisdictional matter; it is one which is required by the statute. The statute has not conferred upon Mr. Tarball any right to abrogate it or waive it, or dispense with it, no more than upon any other member of the community. He says that he did not procure all these signatures; that he took what appeared upon the face of it himself, and presented it as it was signed, to the council. And I do not think that ought to bar him from setting up what would be a serious matter affecting the validity of this ordinance.

But there is another objection, in my mind, to this ordinance. It has been more impressed upon my mind by attempting to solve the problem in the case on the testimony, as to what constitutes a compliance with it. Now, it appeared that they erected a wooden building substantially; the whole plan and purpose and design of it made it a complete wooden building, finished as they intended to finish it. It would not have required any addition to it whatever to have made it complete and finished. Then they took and put on the outside of it a sheeting of roofing steel or roofing iron. There was some testimony as to the quality or character of it, but as far as this question is concerned it did not affect it. Then the question comes, was that a wooden building, covered with iron of this character?

Well, now, the statute do not authorize, in my judgment, as sweeping an ordinance as is passed here. . This ordinance prohibits the erection of any wooden building. The statute says, any wooden building whose outer walls are not made of iron, stone, brick, cement or mortar, or some of them. Now, I think that the contemplation of this section of the statute—for this is the power that they got—was that the council should designate something of some character, of some kind, and not make a sweeping ordinance prohibiting the erection of wooden buildings. It might be that this building would

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not be called a wooden building, it being sheeted over with steel, I do not know; I am free to say that it would puzzle me to ascertain whether that was a wooden building or not. It might be called a wooden building. You might make the steel a little thicker and it would be a wooden building whose outer wall was of iron; and yet it might be a wooden building, in all that would be essential to make up that term and fulfil the conditions of that term. Just what is meant by a wooden building? How much of the building must be of wood and how much of iron, to make it a wooden building? Where will you put the iron in to make it not a wooden building? If putting some iron in a building will make it lose its character of a wooden building, why can't you put it inside as well as outside? Because you are dealing now with the structural character of the building, and what difference does it make whether it is inside or outside, where you put the iron, to make it lose its character of being a wooden building. If you say any building any substantial portion of which is made of iron, stone or brick, ceases, by reason of that, to be a wooden building, why not put it inside as well as outside, on top as well as on the bottom?

Now, the statute did not intend anything of that kind. The statute was made to protect people from danger and property from injury by fire, and it authorized the council to act with reference to persons' right to use their property and construct buildings upon it, in that direction and in that direction only, by specifying that whatever you made your buildings of, if it exceed ten feet in height, whatever the character of the structure might be as a structure complete, its outer wall, to protect from fire and the spreading of fire from within to without and from without to within, should be of one of these various materials which they deem would accomplish that end.

I think on both these grounds that this ordinance is invalid. If they desire to protect their property, I think they should first procure the right, and then pass an ordinance which provides some of these things which the statute authorized them to provide with respect to what the statute authorizes them to control, to-wit, the outer walls.

There are other questions in this case, but it is not necessary to pass upon them, as these determine it.

A restraining order was granted pending the hearing, and then by agreement of parties it was submitted finally upon the testimony as taken, and there has probably been no disposition in the case on the part of any one but just to get at the rights of the various parties in the case and to have them adjudicated for the benefit of all concerned. I think the petition should be dismissed.

E. J. Blandin, for plaintiff.

N. M. Flick, for defendants.

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DISSOLUTION OF CORPORATIONS.

[Cuyahoga Common Pleas, 1900.]

H. J. FITCH ET AL. V. SPRAGUE CARRIAGE CO. ET AL.

APPLICATION FOR DISSOLUTION OF CORPORATION—PRACTICE.

Where a petition for the dissolution of a corporation, on the ground that it is for the best interests of the stockholders, and for an order under sec. 5672, Rev. Stat., requiring directors to file inventories, accounts and statements, is opposed by other stockholders, denying the allegations of the petition, the court should give the parties an opportunity to be heard before making any order.

STONE, J.

The case of Herman J. Fitch et al. against the Sprague Carriage Company is before the court on an application, or motion, to require the defendant, or the officers of the defendant for the defendant proper—the Sprague Carriage Company being an incorporated company—to file in court inventories, accounts, and statements required by sec. 5652, Rev. Stat.

The suit itself is one seeking the dissolution of the defendant company, the Sprague Carriage Company. Originally when the petition was filed, application was made to have the case sent to a referee, under sec. 5654, Rev. Stat., and the former application was made under sec. 5651, Rev. Stat., as I understand it, and the matter was heard before Judge Lamson—one phase of it—and I think a demurrer, possibly, was heard by Judge Neff as to the sufficiencies of the petition. At all events when the original application was made before Judge Lamson, under sec. 5651, Rev. Stat., he overruled or denied the application upon the ground that the petition was insufficient and did not state a cause of action in compliance with sec. 5651; and his opinion given at some length is before me.

After some other preliminary matter, at the hearing of the demurrer to the amended petition, I think by Judge Neff, it was overruled, and the case was presented again to me, as I have stated, upon an application now not made under sec. 5651, but under sec. 5673; that section giving to one-fifth of the stockholders of certain incorporated companies the right to go into court and demand a dissolution of an incorporated company—of a “manufacturing or mining company.” It does appear affirmatively from the petition that plaintiffs are at least owners of one-fifth or more of the paid up stock of the corporation, and therefore, if they make a case coming within the provision of this section, they would be entitled to the remedy, and to the relief contemplated by this section and others to which reference is made.

The Sprague Carriage Company is a corporation organized under the laws of this state, doing business in Berea, engaged, as I learned from an inspection of the papers and the statements of counsel, in the

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buying and selling of vehicles, agricultural implements, bicycles harnesses, and all things connected therewith. It does not appear that they are actually engaged in the manufacture of any of these things, but are dealers in them, but incorporated nevertheless as a manufacturing company.

Objection is made to this application, that is, the application to require inventories, accounts and statements of the business of the company to be filed, because, if, the application is granted at this time, then, under sec. 5654, Rev. Stat., which provides that "upon such petition, accounts, inventories, and affidavits being filed, an order shall be entered requiring all persons interested in the corporation to show cause, if any they have, why it should not be dissolved, before some referee or master commissioner appointed by the court, and to be made in the order, at a time and place therein to be specified, not less than three months from the date thereof; and a notice of the contents of such order shall be published once in each week, for three weeks successively, in some newspaper published and of general circulation in the county wherein the principal place of the business of the corporation is situate." Now, it is said that if this order is granted, then, under this section, the court is required to make this reference, and the contention of the defendant is that before any such order is made they ought to have and are entitled to have a hearing in some way, upon the question whether that order ought to be made. The statute is silent upon the subject. The section reads as I have just read it, and it would appear to show, or authorize the appointment of a referee simply upon the filing of the petition and the compliance with the order requiring inventories, accounts, and statements, required by sec. 5652, Rev. Stat., to be filed, and when that is done then the court must grant this application and have the case heard before a referee.

I have examined this question with some care because it presents an interesting one and one, as far as I know, that has not been before the court here; at least my attention has never been called to a similar case.

I will read part of sec. 5673, Rev. Stat.: "When the stockholders owning one-fifth or more of the paid up stock of a corporation organized for manufacturing or mining, file in the office of the clerk of one of the courts mentioned in section 5651 their petition," and the courts named there are the court of common pleas or the superior court—"that the corporation is insolvent or that the dissolution thereof will be beneficial to the stockholders, or that the objects of the corporation have wholly failed or been entirely abandoned, or that it is impracticable to accomplish such objects or that the profits of the business are being diverted from the best interests of the stockholders equally, etc., etc., and that they therefore desire a dissolution of the corporation, the court shall if it deem it beneficial to the interest of the stockholders, make an order

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requiring the officers of the corporation, within a reasonable time, to file in court the inventories, accounts and statements required by section 5652, and upon the filing thereof the court shall proceed as provided in section 5654."

An inspection of this petition shows that the only complaint they made, or the only ground they allege as the basis for demanding a dissolution of the firm is this: That the dissolution thereof will be beneficial to the stockholders. It is not stated, and it is not claimed that the objects of the corporation have failed or have been abandoned, or that the corporation is insolvent, or that the profits of the business are being diverted from the best interests of the stockholders equally, except it is stated in the petition, that the officers, or those in charge of the business, and who hold a majority of the stock and therefore have control, have agreed among themselves to divide the profits among themselves by way of salary and compensation for services rendered, or which they are pretending to render. That statement is made in addition to the one that I have named, that the dissolution would be beneficial to the stockholders. When the petition was filed it was held originally that it was insufficient. Since that time an amended petition has been filed. So that taking the petition, and the amended petition together, I am not prepared to say but that it makes a cause of action in compliance with the requirements of the section of the statute.

The only question then is: What is the procedure that is required? The plaintiff's motion—since it is asked under sec. 5652, Rev. Stat.—is to require the defendant to file in court the inventories, accounts and statements required by sec. 5652. That is, they shall annex thereto, first, a full, just, and true inventory of all the estate, both real and personal, in law and equity, of the corporation, and of all the books, vouchers, and securities relating thereto. Second, a full, just and true account of the capital stock, if any, of the corporation, specifying the names of the stockholders, their residence, when known, the number of shares belonging to each, the amount paid in upon such shares respectively, and the amount still due thereon. Third, a statement of all encumbrances on the property of the corporation, and all engagements entered into by it which have not been fully satisfied or cancelled, specifying the place of residence of each creditor, and of every person to whom such engagements were made, if known, and if not known, the fact to be so stated; and the sum owing to each creditor, the nature of each debt or demand, and the true cause and consideration of such indebtedness." The motion is to require that sort of a statement to be made by the officers of this company. The question is: Shall the court make that order now upon the petition and amended petition without any other matter before it? The defendants say they ought to have an opportunity to be heard upon this proposition. The contention of the plaintiffs is that they have no right to be heard now; their opportunity to be heard,

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and to be heard fully, is when the case is in the hands of the referee; that is, if the petition complies with the statute, and the court makes this order, and the investigation is before the referee, and not before the court, and that that gives them full opportunity for their day in court.

It is said that defendants desire to take issue and want to file an answer in this case, and the claim on the other hand is that the statute makes no provision for an answer; makes no provision for an issue. The question is made upon the petition itself, and requires no pleading. I apprehend no pleading would be essential probably in the matter of the hearing, because the question arises, after all, whether the corporation is in the condition that it is claimed; if not, the petition would not be granted.

My attention is called to Armstrong, Recr., v. Brewing Co., 53 Ohio St., 467. It don't present this question, that is, the question of pleading at all. Error was taken from the circuit court, and the only question that was concerning the parties in the Supreme Court was as to whether the order made was an order affecting a substantial right in review of error. The court below had made an order requiring the inventories to be attached and they took exception to that. The court said that it wasn't an order affecting anybody's substantial rights, and therefore was not appealable, or error would not lie, within the discretion of the court. But I notice in examining the decision—the opinion which was rendered by Judge Spear, that in that case an answer was filed, and after the answer was filed two of the petitioners appeared in court and asked to withdraw as plaintiffs, and that application was refused. Another stockholder applied for leave to become a plaintiff and filed an additional petition which was allowed, and a motion was made by the defendant to dismiss for want of jurisdiction, which was overruled. A demurrer by the defendant was overruled also and motion to strike that pleading off. A demurrer by plaintiffs to parts of the amended and supplemental answer by defendants was sustained. To all these rulings the defendant preserved exceptions. The court, after hearing and consideration made the following order:

"It is now ordered that the officers of said defendant file a just and true inventory of all the estate, both real and personal, etc."

That is, made the order requiring them to file in court those things required by sec. 5652, Rev. Stat., a full, just and true inventory of the estate, etc., etc.; and that, it is to be observed, was the order after hearing and consideration. Just what a hearing was possible does not appear fully in the case itself. But the language used by the court would indicate that a hearing was had, and probably some evidence taken on the question as to whether the order should be made.

Now, note the language that is used in this statute: "When the stockholders owning one-fifth or more of the capital stock paid up"—and it is averred here that the stock is paid up—"file their petition con-

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taining the statement that the corporation is insolvent, or that a dissolution would be beneficial," etc.—"the court shall, if it deem it beneficial to the stockholders, make this order."

Now, the question that I had in my mind was, and is, ought an order to be made in this case that will have the effect to prevent at least some inquiry here as to the wisdom of having this proceeding go forward, attended by expense and publicity, and the burden that will be upon the defendants if it be made, without first some inquiry to know whether the action is brought in good faith and upon reasonable ground that they are entitled to the relief that they ask? "The court shall, if it deem it beneficial to the interests of the stockholders, make such order." Now, how is the court going to determine? Is the court justified, and ought the court to say from the inspection of the petition itself, without any evidence that it is for the best interests of the stockholders to have this proceeding go forward? Ought the court to say that it is for their best interests to have these inventories filed in court, simply because it is urged in the petition that it is for the best interests of the stockholders to have it dissolved, when representatives of the stockholders are here protesting against it, and claiming the right to make a defense, and claiming the allegations of this petition are not true, and having filed no pleading, yet, because some doubt has been entertained up to this time as to the mode of procedure in such cases? I know nothing about the condition of this company. It does not appear, of course, from the petition itself that it is a going concern. There is no hint that it is insolvent. It is averred, and it is claimed in the petition itself, that these claimants are denied access to the books, and that therefore they do not know anything about the condition of this company, and it is claimed that the profits are being used in the payment of salaries to an unreasonable extent.

My belief is that the prudent course to pursue in such cases, and that it is fully justifiable to allow the defendants an opportunity, before the court makes this order, before the court acts on this motion, to show by evidence whether there is any reason why the court should not make this order; or putting it the other way, that the plaintiffs ought to make some showing in court why this order ought to be made. If the court shall deem it beneficial to have this done, then the court shall require it to be done. I don't know of any way the court is to determine that fact unless some evidence is brought to the court showing the necessity for this order, and when it does appear that it is for the benefit of all that this order should be made, then the court ought to make it; if it does not have that appearance, then I think the court ought to refuse it. So upon the present state of the case the court is of the opinion that this order ought not to be made; that it only should be made after an opportunity for a hearing on the questions raised by the allegations in the petition is given.

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My opinion is that no court ought to permit such an investigation, such a showing, until there is at least reasonable ground that the application is a proper and just one. This seems to me to be only fair to all parties concerned, and especially to a going institution, that necessarily might be harmed, or probably might be harmed in a business way by an investigation of that sort. Certainly there would be considerable expense and inconvenience, which ought not to be made unless the court is satisfied that this proceeding is brought in good faith and upon facts that reasonably support the petition.

INJUNCTION—DAMAGES—PLEADING.

[Cuyahoga Common Pleas. May 5, 1900.]

* L. TARBELL v. C. A. ENNIS.

1. ACTION ON INJUNCTION BOND—PLEADING.

A petition in an action on an injunction bond, alleging that a temporary restraining order was granted and a bond given; that plaintiff was restrained and prevented from completing his building for some time and that he was caused expense in procuring the restraining order to be dissolved and the petition in the original action to be dismissed, by a fair inference amounts to a sufficient allegation of the fact that the court decided that the injunction ought not to have been granted, although the better course would have been to have stated more directly the action of the court as to the restraining order.

2. INJUNCTION ANCILLARY—DAMAGES.

An injunction granted on a petition by a municipality to prevent defendant from completing a wooden building within a square blocked by an ordinance against the erection of wooden buildings, which ordinance was held to be invalid and the injunction to have been wrongfully granted, was ancillary and only the expenses incurred by the injunction itself, not the expenses in contesting the suit, can be allowed in a suit on the bond.

STRIMPLE, J.

The case of Tarbell against Ennis was heard by this court at a prior term. We will consider the questions that were raised in the case on the trial in the order in which they were made at the trial.

First—The objection of the defendant to the introduction of testimony on the ground that the petition does not state facts sufficient to constitute a cause of action.

The plaintiff alleges that on December 18, 1893, the incorporated village of Bedford filed in the court of common pleas a petition for an injunction and restraining order against the plaintiff and one Foster, and praying the court to enjoin and restrain Foster and Tarbell from erecting a building on Main street in said village.

Plaintiff alleges that the temporary restraining order was granted and an injunction bond given in the sum of three hundred dollars conditioned according to law; that he was restrained and prevented from completing his building for some time, and that he was caused expense

* For previous decision in this case by Lamson, J., *ante* 837.

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in procuring the restraining order to be dissolved and the petition in the original action dismissed. And further sets forth an itemized statement of his costs and expenses.

The defendant alleges that the original action was for an injunction, abatement of nuisance and equitable relief; admits the giving of the bond sued upon and the granting of the restraining order, but denies everything else.

Claim is made that the bond secures to the party enjoined damages he may sustain if it be finally decided that the injunction ought not to have been granted, and that for that reason the one who signed the bond is held to something more than the conditions provided for by the bond itself.

While we think the better course of pleading would have been to have stated more directly the action of the court as to the restraining order, we think by a fair inference that there is a sufficient allegation of the fact that the court decided that the injunction ought not to have been granted.

The objection, therefore to the receipt of any evidence under the petition is overruled. And for the purpose of the record an exception was at the time noted.

In the opinion of the court there appears to have been an effort on the part of plaintiff's counsel to avoid the statement in his petition as to what the original action was. He says that the village filed a petition for an injunction and restraining order. The fact is a petition was filed for the abatement of a nuisance; that is, the building would have been a nuisance in the eyes of the law if so completed, had the ordinance prescribing a fire limit been valid. The action for the abatement of a nuisance might have been carried on as an independent action and carried to a final judgment as such.

The original petition is for the abatement of a nuisance, and incidental to that to stop the further perpetration of this nuisance by a temporary restraining order.

It appears from the evidence that the plaintiff Tarbell undertook to proceed with the work of the erection of this building in violation of the order of the court, and proceedings for contempt were instituted, but it was arranged by counsel that the final determination of the restraining order should be at a time when the action was tried upon its merits. The court in that case held that the ordinance was unconstitutional, and by virtue of that fact the restraining order and the action to abate the nuisance both failed.

It will not be contended here by counsel for the plaintiff that the action was for the purpose of in any way embarrassing Tarbell, but was for the purpose of enforcing the ordinance which the village council had passed prescribing certain things in the erection of buildings.

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If the plaintiff is entitled to recover, he is only entitled to recover such damages as he had sustained by reason of the injunction thus wrongfully granted.

We are of the opinion that the injunction in this case was ancillary and that only the expenses occasioned by the injunction itself can be allowed, and any effort or expense incurred in response to the merits can not be allowed, and we think we are sustained in this holding and view by Noble v. Arnold, 23 Ohio St., 264; also Riddle v. Cheadle, 25 Ohio St., 278.

The prayer of the petition in the original action is that the court will make an order granting a temporary injunction restraining said defendants from erecting said building as above described, or from making any additions thereto pending the final hearing in this case, and that at such final hearing said injunction may be made perpetual, and that said building may be declared to be a nuisance and may order the same to be abated.

A surety on an injunction, like sureties in general, can only be held by the strict letter of his bond. And from the evidence in this case, it would be impossible for the court to separate the expenses for attorney fees that were incurred by the temporary restraining order from those incurred in the main action, and this is true as to time plaintiff lost and traveling expenses. We think, therefore, that the defendant can only be held liable for such loss or damages as are fairly the result of this restraining order, and which clearly appears from the evidence to have been such.

From the examination and consideration of the evidence we are of the opinion that the defendant is liable to the plaintiff for the amount he claims for the time wherein he was deprived of the use of the building, \$12 per month, two months, \$24.

There appears to be no confusion about this evidence, and the injunction clearly damaged him to that extent. Judgment for the plaintiff for \$24.

N. M. Flick, for plaintiff.

Wilcox, Collister, Hogan & Parmely, for defendant.

WRONGFUL DEATH—UNBLOCKED SWITCH.

[Cuyahoga Common Pleas, February 3, 1900.]

MARY JOHNS, ADM'X, v. C. C. & ST. LOUIS RY. CO.

1. SECTION 3365 REV. STAT., APPLIES TO TRESTLES.

Section 3365, Rev. Stat., imposing upon railroad companies the duty of blocking guard-rails, except upon bridges, applies to trestles.

2. WHETHER TRESTLE OR BRIDGE—QUESTION FOR JURY.

Whether a structure eighteen feet high, extending over a street and across a river, with draw bridges in it, is a bridge, within the meaning of sec. 3365, Rev. Stat., requiring railway companies to block guard rails except upon

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bridges, or a trestle, is a question for the jury, to be determined in view of the nature and object of the structure, the situation of the place, the use to which it was put, the surroundings and all the circumstances.

3. ASSUMPTION OF RISK DEFEATING RECOVERY.

Where, in an action for wrongful death, caused by failure of a railroad company to fill or block a guard rail, as required by statute, it appears that plaintiff's decedent had worked about the place, as a brakeman, for ten years; that the unblocked rail was an obvious condition; that he had had abundant opportunity to observe that the rail was unblocked; that he made no complaint; in such case decedent must be held to have assumed the danger and cannot recover on the ground of the failure of the company to block the guard rail.

NEFF, J.

In the case of Mary Johns, administratrix, against the Cleveland Cincinnati, Chicago & St. Louis Railway Company, the case was tried at the last term to a jury and a verdict was rendered for the plaintiff. Motion for a new trial was filed, but because of the necessity of having the record of the testimony, and the sickness of the stenographer, it became necessary to defer the hearing of the motion until this term, and it is now ready for disposition.

I am satisfied from a review of the testimony, that while perhaps there may exist some uncertainty as to just how Mr. Johns met his death, inasmuch as there was no eye witness, and he was himself in a state of unconsciousness at the time he was picked up after he was run over, I am satisfied, as I said before, that the proximate cause, the only apparent proximate cause of his injury and subsequent death, was the catching of his foot in an open space, an unblocked space between the main rail of the track and the guard-rail. I think this is apparent from the position in which he lay when picked up. His foot was crushed in between the guard-rail and main-rail, and his body lay mostly outside of the track, so that I think the jury were entirely justified in arriving at such conclusion, and must have arrived at that conclusion, that the proximate cause of his death was the catching of Mr. John's foot between the main-rail and the guard-rail, and I propose to consider this motion with reference to that fact, and upon that assumption.

In the course of the trial counsel for plaintiff offered in evidence and called the attention of the court and jury to sec. 3865, sub-div. 18, Rev. Stat., which provides:

"That every railroad corporation operating a railroad in this state, shall from the first day of October, in the year 1888, adjust, fill or block the frogs, switches and guard-rails on its tracks, with the exception of guard-rails on bridges, so as to prevent the feet of its employes from being caught therein. The work shall be done to the satisfaction of the railroad commissioner."

It will be observed that that imposed upon the railroad company the duty to block the space between the guard-rails and the main-rail—the rail next to the guard-rail—except upon bridges.

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Here arises one of the matters much mooted by counsel in the argument, and upon which the court must give its opinion.

It is contended on the part of the plaintiff, that the structure, which, from the testimony, appears to have been eighteen feet high, extending over Scranton avenue, across the river, just precisely to what point I do not now remember, having two draw bridges, it is contended on the part of the plaintiff, or was, that this structure was not a bridge, that it was a trestle. On the part of the defendant, it was claimed that this was a bridge, or is a bridge. And it is therefore contended by the defendant that the statute could have no application; there is no duty imposed by the statute upon the railroad company to block or to fill in the space between the guard-rail at the point where the accident occurred, and the main-rail. A good deal of learning and ingenuity is displayed by counsel on both sides on this question.

I remember, and my review of the charge clears my memory upon that question, that I submitted to the jury, after giving the definition of Webster as to what a bridge is, the question to the jury and said to them that if they found, after examining all of the evidence upon the subject, the nature and object for which the structure was erected, the situation of the place, the use to which it was put, the surroundings, and all the circumstances, I said to them if they determined from all the evidence whether or not the structure in question was a bridge, "If you find it was, I say to you that the statute imposes no obligation upon the defendant company to fill the space, but that on the other hand, if you find that it was not a bridge, that then under such finding the statute would operate and impose the duty upon the railroad company to fill that space between the guard-rail and the main-rail."

Now, I think that the inferences to be drawn from the evidence are not so clear as that the court can say that the finding of the jury was manifestly against the weight of the evidence. I assume that they found it was not a bridge. Counsel in argument, whether consciously or unconsciously, seem to assume that the jury did find it was a bridge. I am unable therefore to find any ground upon which to interfere with this finding of the jury on that ground. But, however, the contention is, and that brings us to the principal question in my judgment, that the testimony shows that Mr. Johns, the decedent, had been at work about that yard or that place, in the neighborhood, some ten years, as a brakeman; that this was an obvious condition of things; that he had abundant and ample opportunity to observe that it was unblocked, and that no complaint was made by him, and that therefore he assumed the risk and cannot make that a ground of recovery, because, in remaining in the employment without complaint, he elected to assume the risk, and did, of the improper condition of the frog. That suggestion struck me with great force, and it seemed to me to be conclusive of any right of ultimate recovery on the part of Mr. Johns' administratrix. But

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counsel for plaintiff cited a recent decision of Judge Taft, in Narramore v. Big Four Railroad Co., Ohio Fed. Dec., 7, in which Judge Taft holds distinctly, that where a statute is passed imposing a specified duty upon a railway company to block its frogs, that failure in that respect is not only negligence *per se*, but that the existence of the statute appears to exempt the employe from the assumption of risk which otherwise, upon common law principles, he would be held to assume. And in the fifth branch of the syllabus goes distinctly to that proposition ; it is in this language : "Courts will not enforce or recognize the doctrine of assumption of risk as against the servant of a railroad company, arising upon an agreement, express or implied, to waive the performance of a statutory duty of the railroad company imposed for the protection of the servant, and in the interest of the public, and enforceable by criminal prosecution."

If the doctrine as announced by Judge Taft, can be reconciled with the authorities in Ohio, or if there is no distinct conflict such as to render the holding of Judge Taft repugnant to the holding of the Supreme Court of this state, I shall feel in duty bound, at least inclined to follow the holding, because I entertain for the abilities of Judge Taft the highest respect. If the doctrine as announced by Judge Taft is the law of Ohio this motion must be overruled ; if it is not, the motion must be granted. And it presents a question of quite a good deal of interest as well as novelty.

Judge Taft in the opinion says this : "In the absence of the statutes and upon common law principles, we have no doubt that in this case the plaintiff would be held to have assumed the risk of the absence of block, in the guard-rails and switches of the defendant. His denial of knowledge of the fact that the particular guard-rail causing the injury was unblocked, is entirely immaterial. Nor is his vague statement that he was so busy as not to notice whether the rails and switches of plaintiff generally were unblocked in a yard where there were hundreds of guard-rails and switches, and in which he was constantly at work for seven months, of more significance and weight. His evidence upon this point is not creditable to him. He could only have been ignorant of the admitted policy of the defendant, in respect to blocks, through the grossest failure of duty on his part, in a matter that much concerned his personal safety and the proper operation of the road. In such a case the authorities leave no doubt that the servant assumes the risk of the absence of the blocks, and the employer cannot be charged with actionable negligence toward him."

That undoubtedly was a common law rule, and in support of that statement Judge Taft arrays a large number of authorities which leave no possible doubt but that by common law principles there is a distinct assumption raised under such circumstances. However, he says : "The sole question in the case, is whether the statute requiring defendant rail-

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way, on penalty of a fine, to block its guard-rails and frogs, changes the rule of liability of the defendant, and relieves the plaintiff from the effect of the assumption of risk which would otherwise be implied against him."

After a very elaborate and clearly reasoned opinion Judge Taft concludes : " That the adoption of assumption of risk has no application in such case."

And he argues that the theory of assumption of risk in such a case would read the statute out of the contract. Therefore he holds distinctly and clearly that the existence of the statute forbids the application of the doctrine of assumption of risk to such a case.

Looking at some of the decisions cited by Judge Taft, indeed practically all of them, the first case cited is that in the 19 Q. B., Div. 423, which is a case holding distinctly in favor of the doctrine announced by Judge Taft. I shall content myself with the syllabus, as indeed I shall in all of these cases.

" The plaintiff's husband had been employed in the defendant's coal mine. One of the rules established in the mine under section 52 of the coal mines regulation act, 1872, requiring a banksman to be constantly present while the men were going up or down the shaft, but it was the regular practice of the mine, as the plaintiff's husband well knew, not to have a banksman in attendance during the night. The plaintiff's husband was killed in coming out of the mine at night by an accident arising through the absence of a banksman. In an action under the Employers' Liability Act, 1880: Held, that the defense arising from the maxim *volenti non fit injuria* was not applicable in cases where the injury arose from the breach of a statutory duty on the part of the employer and that the plaintiff was entitled to recover."

(Thomas v. Quartermain, 18 Q. B., Div. 685, discussed. Not overruled, not dissented, but discussed; precisely what that might imply I don't know.)

Now, turning to 18 Q. B., Div. 685, limiting myself to the second branch of the syllabus:

" Held, (by Bowman and Fry, Lord Esher dissenting) that the defense arising from the maxim *volenti non fit injuria* had not been affected by the Employers' Liability Act, 1880, and applied to the present case, and that there was therefore no evidence of neglect arising from a breach of duty on the part of the defendant towards the plaintiff, and that the plaintiff was not entitled to recover."

That case was neither overruled nor dissented from, but discussed. The syllabus of the 18th is distinctly against the doctrine of the 19th.

The next case that is cited is Holmes v. Vlarge, 6 Hurl. and Nor., 349. " Where machinery is required by statute to be fenced and a servant enters into the employment of the owner whilst it is protected and continues in the service after the protection is removed by decay or

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otherwise, but complains of the injury and is promised that the protection shall be restored, the master is liable for injury to the servant arising from the want of such protection." This case rests upon a different principle.

The 97 Mo., 62, is also cited. This is a distinct holding in favor of the doctrine announced by Judge Taft:

"A person employed as cager in the bottom of the shaft of a coal mine is within the protection of the act of March 23, 1881, requiring the owner, agent, or operator of such mine to provide safe means of lowering and hoisting persons in a cage covered with boiler iron, and giving a right of action for injury to the person occasioned by any wilful violation of the act, or wilful failure to comply with any of its provisions.

"Second. Mere knowledge by the plaintiff of the failure of the defendant to have the mine provided with the protections required by law, will not defeat an action for the recovery of damages occasioned by such failure.

Seemingly a case supporting the doctrine as announced by Judge Taft. This case is cited and commented upon by Krause v. Morgan 53 Ohio St., 26, to which I shall refer later.

The 83 Mich., 564, is also cited by Judge Taft: This case is not exactly parallel in principle, because the last branch of the syllabus is to the effect that the failure of a railroad company to comply with the provisions of said act, would render it liable to an employe who is thereby injured in a case where the law applies in case where he is not himself guilty of negligence.

In 50 Northeastern 368, an Indiana case, is also distinctly in point and holds that the doctrine of assumption of risk has no application in a case of this kind. The second branch of the syllabus is as follows:

"A master who, under Burns' Revised Statutes, 1894, 7466, 7472 and 7473, relating to the safety of miners, owes his servant the duty of providing a safe place for him to work, is not relieved from liability for his negligence by the servant's negligence, or notice of danger and assumption of the risk."

That was to the extent of holding that the existence of the statute, and the failure on the part of the defendant to comply with it, does not exempt the defendant from liability even though there be contributory negligence on the part of the employe. This case is distinctly in favor of the decision of Judge Taft.

We have then so far the 19 Q. B., Div. 423; 97 Mo., p. 52; 50 N. E., p. 368, distinctly holding the doctrine as announced by Judge Taft. On the other hand, Knisely v. Pratt, 148 N. Y., 872, the third branch of the syllabus:

"A woman employe over 21 years of age, who had, under the common law doctrine assumed the obvious risk of operating a machine with unguarded cog wheels, in an establishment subject to the factory act,

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which act requires cog wheels to be guarded, having been injured through the lack of such guard, in cleaning the machine while in motion—an operation not prohibited by the act in the case of women employees over 21 years of age—brought an action against her employer for damages, on the ground of neglect and was non-suited. Held, that the non-suit was proper on the ground of the assumption of the obvious risk by the plaintiff."

Judge Taft says that case was not properly decided.

In 79 Fed. Rep., 500, another case was cited. The second syllabus is as follows:

"The New York 'Factory Act' does not impose any liability upon an employer for injuries received by a minor in his service, arising from the obvious risks of the service he has undertaken to perform. And the liability of the employer is not changed by reason of the act requiring cog wheels to be covered, as such protection is waived by a person accepting employment upon the machine with the cogs in an unguarded condition."

The 154 New York, is to the same effect; so also the 158 Mass., which cites the case of the 18 Q. B., Div. 685, discusses it and states the rule on page 136:

"One, who, knowing and appreciating a danger, voluntarily assumes the risk of it, has no just cause of complaint against another who is primarily responsible for the existence of the accident."

And again, in the 160 Mass., the same doctrine is announced. But Judge Taft says that Knisely v. Pratt, *supra*, was wrongly decided because the New York court did not properly appreciate and understand the cases in Massachusetts; but the cases in Massachusetts are as distinctly against the proposition that Judge Taft urges, in my judgment, as Knisely v. Pratt. So that Massachusetts and New York are distinctly arrayed against Judge Tait on that proposition.

The case cited in the 161 U. S., I think can have no effect upon this question. Chief Justice Fuller, in the closing paragraph of the opinion, uses this language :

"This engineer was entitled to rely upon the company as having properly constructed the road, and to presume that it had made proper inquiry in respect of latent defects, if there were any, in the construction, for such was its duty, and he cannot be held to knowledge of the danger lurking in this narrow seam in the mountain side, by whose inequalities its sinuosities were hidden."

I think perhaps, after the very elaborate phraseology of the court we may guess at the meaning which underlies it. There the dangers were latent and hence not obvious. Hence this case can have no possible application to the case at bar.

The syllabus in the 91 Fed. Rep., 224, is also against the position taken by Judge Taft, as also the 143 Mass., 470, 471.

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Now, that is the status of the law so far as I have been able to investigate it, outside of Ohio. Apparently the weight of authority in Massachusetts, New York and other states, and the judges of other circuits of the federal court, is against Judge Taft. But the reasoning of Judge Taft in the opinion which I have stated is very forcible and very clear. His proposition is this, if I understand it: That the distinction between assumption of risk and contributory negligence, is marked; that assumption of risk grows out of the terms of the contract itself; that when an employe enters upon his employment he agrees to assume such risks as are ordinarily and naturally incident to the work in which he engages, unless discovering defects, he goes to the master, and the master promises to repair, then the burden, as to the known defects shifts from the servant to the master, and the master thereafter, within a reasonable time at least, assumes the risk.

If there be assumption of risk there never is a cause of action; that is to say, if the risk be such as the servant assumed, then there never was a liability on the part of the master; whereas contributory negligence is such lack of ordinary care on the part of the employe, which, combining with the neglect on the part of the master, becomes proximate cause of injury.

Now, what is the law in Ohio? Our Supreme Court seem utterly to have confounded the distinction between assumption of risk and contributory negligence, and I shall call attention to that in a few minutes. There is a well marked distinction. A servant may go to work voluntarily upon a defective machine, knowing it to be defective. He assumes the risk. He may exercise, after having gone upon that work, the utmost degree of care. He is not guilty of contributory negligence because he has used the highest possible degree of care in the manner in which he has operated that machine. He is cut off from any recovery, because, as part of his contract, the instant he became aware of that fact, if he continues without complaint to the master, he thereafter distinctly himself assumes the risk, and can have no recovery. Yet our Supreme Court, as I shall call attention in a moment, has utterly confounded those two things.

Now, the first, in the chronological order, decision of our Supreme Court on this subject is Mad River & L. E. R. R. Co. v. Barber, 5 Ohio St., 541, and I shall read merely the last branch of the syllabus, and what the court said upon the subject on page 562:

"It is the duty of a railway company to furnish the necessary and proper number of hands for the safe management of its trains; and for a delinquency in this particular, the conductor has a right to decline his charge, or refuse to run the train. But where he takes the charge, and runs his train for a length of time without a sufficient number of hands, he voluntarily assumes the risk, and waives the obligation of the company in this respect, as to himself, and if injured by means of such

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delinquency on the part of the company, he is without a remedy against the company for damages."

Now, I will read from the opinion: "For if the agent or employe of the company waive the omission of duty on the part of the company, he takes the risk upon himself, and if damaged, he must abide by the maxim *volenti non fit injuria*," treating it there as an assumption of risk in that case, which is the first in the series of Ohio cases.

The next case is 32 Ohio St., 494, Baker v. Prendergast: "A person about to cross a street of a city in which there is an ordinance against fast driving has a right to presume, in the absence of knowledge to the contrary, that others will respect and conform to such ordinance; and it is not negligence on his part to act on the presumption that he is not exposed to a danger which can only arise through a disregard of the ordinance by other persons.

"But where he knows that others are driving along the street at the place of crossing, at a forbidden rate of speed, and he has full means of seeing the rate at which they are driving, the existence of such ordinance will not authorize a presumption which is negative by the evidence of his senses."

This is a case of contributory negligence, and of course, no such doctrine as assumption of risk can apply, because the relation of master and employe does not exist.

Now, the next case is L. S. & M. S. Ry. Co. v. Knittal, 38 Ohio St., 468. The second branch of the syllabus is as follows:

"If, however, such employe with a full knowledge of an habitual and continued negligence of the company or his superior fellow employe in some particular matter, acquiesces therein, and continues in the service of the company without any objection or effort toward a correction of the neglect, he thereby waives his right against the company and takes the risk upon himself."

The case of Manufacturing Co. v. Morrissey, 40 Ohio St., 148, is a very well known case. "M, while using a machine in his capacity of workman for a manufacturing company, acquired a knowledge of its defects and consequent unsafe condition. He complained of its condition to the foreman, under whose order he was working, and whose duty it was to see that the machine was kept in good order and repair. The foreman promised him to remedy said defects and directed him to go to work on the machine. The workman thereupon remained in the service of the company and continued to use the machine, and in so doing was injured through its said defects before any steps were taken to remedy the same.

"Held, that the workman's knowledge of the defects in the machine was not, under the circumstances and as matter of law, conclusive or contributory negligence on his part; but it was a fact in the case to be taken into consideration by the jury, with all the other facts and

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circumstances, in determining the question whether the workman's own negligence contributed to the accident by which he was injured."

This is the case where our Supreme Court utterly loses the distinction between assumption of risk and contributory negligence. If that machine was defective and the workman discovered the defect and applied to the master and had a promise to repair, the effect of that promise was to exempt the servant from the assumption of risk, and make the risk assumed by the master, and yet our Supreme Court treats it purely as a question of contributory negligence. This is more apparent from an examination of the opinion:

"That a knowledge of the unsafe condition of the machinery used, is a most important element in determining the question of contributory negligence, there can be no doubt. Alone and unexplained, it may, under some circumstances, be conclusive that the injured party was willing to assume the attendant risks, and waive all objections to the defects that rendered the machinery hazardous."

If he assumed the risk and waived objection, then the doctrine of contributory negligence has no application whatever, showing that the court in a clear case treated the assumption of risk as contributory negligence, which is not and cannot be tortured into.

In *Coal & Car Co. v. Norman*, 49 Ohio St., 598: "In an action by a servant against his master for an injury resulting from the negligence of the latter in furnishing appliances or in caring for the premises where the work is to be done, the plaintiff must aver want of knowledge on his part of the defects causing the injury ; or that having such knowledge, he informed the master and continued in his employment upon a promise, express or implied, to remedy the defects ; an averment that the injury occurred without fault on his part is not sufficient."

Judge Minshall says in the opinion: "And as a further limitation upon the liability of the master for injuries received by the servant in the course of his employment, it is equally well settled that no recovery can be had against the master where the cause of the injury, of whatever nature, was unknown to the master and could not have been known in the exercise of ordinary care. And furthermore, no recovery can be had where the source of danger is known to the servant, and he, without communicating his knowledge to the master, continues in his service ; in such case he is presumed voluntarily to assume the risk, and is without remedy."

Not that he may have a remedy, and then be defeated in that remedy because of his own negligence, but that he is without remedy.

We come to the latter doctrines of the Supreme Court on this question, and that is claimed by counsel for the defendant to be decisive of the question at bar. The second branch of the syllabus in *Krause v. Morgan*, 58 Ohio St., 26, is as follows :

"One who voluntarily assumes a risk"—that is precisely the language of the syllabus in the Massachusetts cases, and it is precisely the language in *Krause v. Morgan*, *supra*. "One who voluntarily assumes a risk, thereby waives the provisions of a statute made for his protection. And where a statute does not otherwise provide, the rule requiring the plaintiff in an action for negligence to be free from fault contributing to his injury, is the same, whether the action is brought under a statute or at common law."

The first branch of that syllabus directs itself to a question of assumption of risk. The second branch of the syllabus, with equal clearness, directs itself to a doctrine of contributory negligence; we have them both. And the writer of this syllabus evidently did not have before him at that time a very clear and well marked distinction between the two because they were widely separated and widely differentiated, and contradistinguished in many respects. This was an action that was brought under the mining statute: "Under secs. 298 and 301, Rev. Stat., which require the operator of a coal mine to keep the same free from gas, and to have the working places examined every morning with a safety lamp before workmen are allowed to enter, and give a cause of action to a person injured for direct damage occasioned by any violation or wilful failure to comply with the requirements of the statute, an employe cannot maintain an action against his employer for an injury following such violation, unless at the time he was injured he was in the exercise of due care."

Now, it was argued in the trial of this case, and Judge Taft says, that there may be an assumption of risk where a statute requires a specific duty, and he seeks to distinguish this holding from the Massachusetts and New York cases, because there, there were general duties imposed, while here was a specific duty. It was urged in *Krause v. Morgan*, *supra*, that the effect of the statute was to exempt, or rather the doctrine contended for was that the statute would be nugatory, that no effect would be given it. And Judge Taft holds along that line. That was urged in *Krause v. Morgan*, *supra*. And Judge Spear discusses other questions preliminary to this before he comes to the questions presented here. Now, the common please court had charged the jury:

That "if the plaintiff in this case knew some time before his injury, that there was fire damp generated in this mine, in or near the place where he was working, and that the defendant was not causing the mine to be examined every morning with a safety lamp, but was undertaking to remove the gas by other methods, and that the plaintiff made no complaint of this method, but voluntarily continued in the service of the defendant, he could not recover in this action. In such case, he would have waived compliance with the statutory requirements, and would continue in the employment with full knowledge that the same was not being complied with." That request was made by the defendant below.

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The circuit court reversed the common pleas court because it gave that request, which instruction the circuit court held to be erroneous. "If both plaintiff and defendant knew that fire damp was being generated in this mine, and in the part of the mine in which plaintiff was working"—now, the common pleas court gave those instructions, and the circuit court reversed it because of that, holding that to be erroneous. The Supreme Court reversed the circuit court, holding that those instructions ought to have been given and that the court ought to have said that under such circumstances he would have waived compliance with the statutory requirements, and would continue in the employment with full knowledge that the same was not complied with.

Judge Spear goes very thoroughly into a discussion of the case; first taking up the question of wilful injury, which of course, does not arise here. He reviews quite a good many cases, the 83 Mich., for instance: "A statute of Michigan provides that all operators of rail-roads are required to so adjust, fill or block the frogs, switches and guard-rails on their roads in all yards, so far as to prevent the feet of persons from being caught therein; and any company which fails to comply with the provisions shall be liable to a fine not less than a hundred or more than \$1,000.00, and neglect to comply shall be deemed a violation. In *Grand v. Railroad Co.*, 88 Mich., 564, it is held that a person injured by being caught in a frog not blocked, as required by this statute cannot recover where he is himself guilty of negligence." Our Supreme Court say: "The law of negligence is based upon the necessity of a policy which, in the affairs of life, will induce caution, and when it is asked that a particular construction be given a statute enacted for the purpose of protecting life and limb, we are bound to inquire whether such construction will encourage or discourage carefulness. If the latter, it should not be adopted unless the language of the act is so clear as to practically leave no room for construction. The text of the act in question furnishes no encouragement to the idea that one who is at fault himself, which contributes directly to, and is the proximate cause of the accident may yet recover, because of the previous failure of the operator of the mine to comply with the statute."

And in another paragraph: "And we think it still wise to adhere to the old rule that where the injured party knowingly and deliberately assumes the risk that leads him into immediate danger, he ought not to have a remedy for injuries brought on by his own act and arising from perils that are obvious and certain. A safe, and it seems to us, a humane policy, looking to the prevention of accidents is to require that all persons engaged in hazardous undertakings shall act up to the standard of due care set by the law."

Now, answering the objection of Judge Taft: "Does it, therefore, follow that sections 298 and 301, can have no beneficial effect? By no means. While the statute, as we construe it, does not make the opera-

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tor of the mine absolutely liable to a party injured by an explosion of gas, where the operator has not complied with the statute, such conduct is negligence *per se*, and the employer cannot escape liability by showing that he took other means to protect the workman equally efficacious. Proof of failure to obey the statute is all that is necessary to establish negligence on the part of the operator, but the statute does not change the well established rule that where one has been guilty of negligence which may result in injury to others, still the others are bound to exercise ordinary care to avoid injury."

Our Supreme Court has thus given, to my mind, the clearest answer to Judge Taft with respect to the doctrine that there may be assumption of risk in a case like the one at bar.

Next is the case of Coal Co. v. Estievenard, 53 O. S., 43. The fifth branch of the syllabus of which is in this language: "If one party has been negligent, and the other party has knowledge thereof, or is chargeable with such knowledge, he must thereafter act, with reference to such negligence, and cannot shut his eyes and claim that he relied upon a proper performance of duty by the other party," holding that one who voluntarily assumes a risk thereby waives the provision of the statute made for his protection.

Recurring to the decision of Judge Taft: "In such a case the authorities leave no doubt that the servant assumes the risk of the absence of the blocks, and the employer cannot be charged with actionable negligence towards him."

The proof in this case shows that Mr. Johns had worked about this place, in that neighborhood, for some ten years as a brakeman. The space was unblocked. The risk was obvious; there were no complaints, as the evidence tends to show; and there would be an assumption of risk unless the distinction made by Judge Taft is correct.

I am convinced that the weight of authorities outside of Ohio is strongly against the doctrine announced by Judge Taft. We have the highest court of Massachusetts and New York, in two decisions in each state. There are many other decisions of other courts against the doctrine announced by Judge Taft. That position is to my mind utterly irreconcilable with the law of Ohio, as announced by our Supreme Court, and I have been thus perhaps tedious in my review of the authorities merely from the sense of high respect which I entertain for the distinguished ability of Judge Taft as a jurist, equal perhaps to any in the country. In saying this I do not disparage anybody holding the position of judge in any of the federal courts.

Being of the opinion above referred to, I am compelled to grant the motion for a new trial. However, owing to the sickness of the stenographer this case had to go over to this term. If counsel desire it I will, order it assigned at once for trial.

J. O. Winship and N. J. Shupe, for plaintiff.

E. A. Foote, for defendant.

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LEASES—GAMING.

[Allen Common Pleas, 1900.]

CHARLES L. ACKERMAN V. JOSEPH C. THOMPSON.

1. SECTION 4276, REV. STAT., FOR BENEFIT OF LESSOR.

The provisions of sec. 4276, Rev. Stat., providing that when premises are occupied for gaming or lottery purposes the lease or agreement in which they are held shall be absolutely void at the instance of lessor, is for the benefit of the lessor and leasee cannot render the lease void by using the premises for gaming purposes. Such lease is not void *ab initio*.

2. STATUTE A CONDITION SUBSEQUENT.

The provisions of the statute above referred to do not amount to covenants running with the land; nor is the statute a limitation on the fee. It constitutes a condition attached to the estate for years and is a condition subsequent, not precedent.

3. RIGHT OF ELECTION PERSONAL TO LESSOR.

The right of election is personal to the lessor and not subject to alienation, especially in the absence of a covenant in the lease that conditions therein stipulated or annexed by law shall extend to the assigns of either party.

4. REVERTEE DOES NOT PASS TO GRANTEE OF LESSOR.

A reverter dependent upon the happening of an uncertain event, does not pass under the general terms of a deed. Therefore the grantee of a lessor who had previously granted an estate for years, takes the fee limited by such estate and the right of election to declare the lease forfeited if premises are occupied for gaming purposes, does not, pass under the general terms of the lessor's deed. Such grantee cannot assert the forfeiture or maintain an action in forcible detention to recover the premises.

5. RULE AS TO FORFEITURE.

Whatever may be the nature or kind of forfeiture, it is never carried by construction beyond the clear expression of the statute creating it.

On motion for leave to file petition in error.

ARMSTRONG, J.

Joseph C. Thompson recovered a judgment of restitution against Charles L. Ackerman, before a justice of the peace in an action of forcible detention. The plaintiff in error now applies for leave to file his petition in error to reverse the judgment. The petition in error contains ten assignments of error. It appears from the complaint and bill of exceptions that Joseph Satterthwait, March 20, 1894, was seized in fee of realty in Lima, Ohio, known as "The Elk." He executed on that date, a deed of lease to Daniel Freel. The term stipulated therein is five years from that date, with the privilege of a further term of five years.

The election has been exercised. The limitation on the fee created by the lease is ten years' duration.

Joseph Satterthwait conveyed the same premises to the defendant in error, Joseph C. Thompson, July 14, 1897.

Daniel Freel assigned his interest in the leasehold to Michael Ackerman, who sub-let by oral contract to the plaintiff in error, Charles L. Ackerman. Charles L. Ackerman now occupies said premises as such

sub-tenant by virtue of his oral contract, and his term thereunder is from year to year.

Thompson's action is against Charles L. Ackerman only. Thompson claims the right of possession of said premises, on the alleged ground that Charles L. Ackerman is occupying said premises for gaming purposes, and that the contract under which the premises are held is void, by reason of the unlawful business. The bill of exceptions contains the following:

"It is agreed by counsel for plaintiff and defendant that on February 3, 1900, there was gambling conducted on the premises described, and that the gambling was with the knowledge and consent of Charles L. Ackerman, the defendant in this proceeding."

Joseph C. Thompson caused the usual notice to leave the premises to be served on Charles L. Ackerman February 7, 1900. It does not appear from the record that the deed to Thompson or Freel contains a stipulation that the conditions of the leasehold shall extend to the assigns of each. The eighth assignment of the petition in error is:

"That the court erred in its charge to the jury."

The charge to the jury contains the following paragraph:

"If you find from the evidence and admissions in this case that gambling was permitted or carried on in said premises, then your verdict shall be "guilty," as charged in the complaint."

This charge to the jury announces that the single act of gaming, *ipso facto*, renders the lease void.

It is not urged that a single act of gambling on the premises with the knowledge and consent of the sub-tenant will render the lease void on consideration of public policy. But the provisions of sec. 4276, Rev. Stat., are alone relied upon for declaring the lease void.

That section is as follows:

Section 4276. (What contract, etc., concerning property for gaming purposes void.) Whenever premises are occupied for gaming or lottery purposes, the lease or agreement under which they are so occupied shall be absolutely void at the instance of the lessor, who may at any time obtain possession by civil action, or by action of forcible detainer, before a justice of the peace; and if any person lease premises for gaming or lottery purposes or knowingly permits them to be used and occupied for such purposes, and fails immediately to prosecute in good faith, an action or proceeding for the recovery of the premises, such lessor shall be considered in all cases, civil and criminal, as a principal in carrying on the business of gaming, or a lottery in such building."

It is evident that the provisions of this section are not for the benefit of the lessee or his assignee, but for the benefit of the lessor. It is also evident that the lessee cannot render the lease null and void by using the premises for gaming purposes. He cannot by such act terminate the estate created by the deed of lease.

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He cannot by that act relieve himself of the payment of the rental, or other liabilities created against him by the terms of the lease. If he can by his own act effect these results he may take advantage of his own wrong.

It is not insisted that the terms of the lease permit an unlawful use of the premises. The contract of lease therefore was not void *ab initio*.

It is not claimed that the contract of lease contains a condition of forfeiture expressly assented to by the parties, but the condition is one of law depending on the provisions of sec. 4276, Rev. Stat.

The provisions of sec. 4276, Rev. Stat., that "whenever premises are occupied for gaming or lottery purposes, the lease or agreement under which they are so occupied shall be absolutely void at the instance of the lessor, who may at any time obtain possession by civil action or by action of forcible detainer," does not amount to a covenant that runs with the land; for covenants depend upon agreements, express or implied, between the parties. Neither is the provision of the statute a limitation on the fee. But the provision of the statute constitutes a condition attached to the estate for years. The estate for years vested in the lessee. Therefore, the condition is subsequent and not precedent.

The estate is subject to be defeated and terminated before the expiration of the ten years on a breach of the condition subsequent.

Using the premises for gambling purposes may forfeit the estate for years before the limitation of the ten years had elapsed. This condition of forfeiture of the lease is annexed to the terms of the lease by implication of law. It binds the parties as effectually as if stipulated in the deed of lease by the parties themselves.

But it is clear that the mere act of gambling does not render the lease void, and *ipso facto* terminate the estate for ten years before the period has elapsed, for if that result, then the contract would be void as to both parties, and the lessee or assignee would have the same right and benefit that the lessor would have, though he be innocent of complicity in the unlawful act. It is likewise clear that the lessee or his assignee or sub-tenant cannot elect to declare the lease void because of the use of the premises for gambling purposes. If that statute did not expressly confine the right of election to declare the lease void to the lessor, such election would be restricted to him on general principles. But the statute provides that the lease shall be void at the instance of the lessor.

Hence, the lessor has an election to continue the estate for years, or declare it void. If he elects to declare it void then the estate for years determines and a reverter ensues at once. It appears from the record that the assignee of the lessee had a vested estate for years, on February 3, 1900; that the estate would continue and not terminate until March 20, 1904; that the estate might terminate before the limitation expired on breach of the condition at the instance of the lessor.

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Joseph C. Thompson had the fee in the same premises subject to the estate for ten years carved out of the fee. He also had such reservation of rentals as may have passed to him under the deed as a covenant inhering in the land. Has he more? Did his deed from Satterthwait vest in Thompson the right to continue the estate for years or terminate it on breach of the condition, at his election? Or, is such right of election personal to the lessor and not subject to alienation, especially in the absence of a covenant in the lease that conditions therein stipulated, or annexed by law, shall extend to the assigns of either?

The possibility of a reverter before the limitation of ten years elapses is a contingency dependent on the happening of an uncertain event, to-wit: Using the premises for gambling purposes.

This right of reversion in the lessor is a mere expectancy.

Satterthwait and Thompson did not have the possibility of reverter before the expiration of the ten years, in contemplation at the time Satterthwait conveyed to Thompson. The reverter depends on the commission of a succession of criminal acts. These acts would not be presumed. They did not have them in contemplation, so the possibility of a reverter did not pass by the general terms of the deed.

The possibility of a reverter depending on the happening of an uncertain event is not subject to alienation. This principle is not confined to a reversion of the fee, but applies to lesser estates.

Satterthwait could convey his reversion in the fee after the expiration of the ten years, because the estate for ten years marked a certain period of limitation on the fee.

It is not an expectancy, but a certain vested estate that was subject to alienation. Thompson could take more by his deed than the fee subject to the entire limitation of ten years.

In *Walker Branch v. Cemetery Association*, 5 Circ. Dec., 326, 329, the principle that the possibility of a reverter is not such an estate or interest in land that is subject to sale, is clearly announced in the following language:

"The possibility of a reverter does not rise to the dignity of an estate, but is a mere expectancy or possibility which can neither be transferred nor released.

"If the condition subsequent were broken, that did not *ipso facto* produce a reverter of the title. The estate continued in full force until the proper steps were taken to constitute the forfeiture. This could be done only by the grantor during his lifetime, and after his death by those in privity of blood with him. In the meantime only the right of action subsisted, and that could not be conveyed so as to invest the right to sue in a stranger. 97 U. S. R., 693-6."

The language of the statute is that the agreement or contract is void at the instance of the lessor. If the legislature had intended that the

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word lessor should mean owner, it would have been easy to have so said.

It was early announced as a rule of construction in Ohio, that whatever may be the nature or kind of forfeiture, it is never carried by construction beyond the clear expression of the statute creating it.

Sherman in Lessee of Bond v. Swearingen, 1 Ohio, 403. "It is elementary that forfeitures are not favored and are adjudged even in courts of law upon strict right. Covenants of forfeiture are to be construed strictly and most strongly against the parties claiming a forfeiture. Wright, 57. Sutlif, C. J., Smith v. Whitbeck, 13 Ohio St., 477, says:

"He who asserts for himself title by forfeiture must prove it by establishing every fact and showing every circumstance and condition requisite to constitute a forfeiture without the benefit of any presumptions in his favor."

Lane, C. J., Lessee of Boyd v. Talbert, 12 Ohio, 214, says:

"The exaction of this right (forfeiture), meets with little countenance from the law, and he who asserts it must strictly comply with every condition to the letter."

These elementary principles have never been abrogated in Ohio.

There seems no satisfactory reason why they apply to freeholds and not to estates for years. The controlling feature of the principle is that an expectancy is not the subject of transfer; that a reverter depending on the happening of an uncertain event does not pass under the general terms of the deed.

It follows that the right to declare the forfeiture before the expiration of the ten years never vested in Thompson. He could not, therefore, elect to terminate the estate.

The above instruction to the jury would seem to be erroneous, and the complaint does not state a cause that Thompson can maintain.

The motion is allowed.

Ridenour & Halthill, for plaintiff in error.

Richie, Leland & Roby, for defendant in error.

DEBTORS AND CREDITORS.

[Hamilton Common Pleas, 1900.]

HALBERT B. CASE, TRUSTEE, ETC., v. CHARLES H. HEWITT, ET AL.

1. INVALID DEED FROM HUSBAND TO WIFE.

A deed of settlement by a husband to his wife, without other consideration than love and affection, should be set aside where it appears that the husband, engaged in mercantile business, was, at the time of making such deed, owing numerous creditors, and did not reserve sufficient property to pay his debts.

2. ESTOPPEL—MORTGAGE EXCEPTING INVALID CONVEYANCE.

A mortgagee, in whose mortgage there is an exception of property conveyed as above stated, is not estopped by such exception from asserting his lien as prior to that of the deed of settlement referred to and held invia id.

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3. DEED OPERATING FOR BENEFIT OF ALL CREDITORS.

A deed of trust for the payment of creditors named, the balance, if any, of the proceeds of the sale of the property to go to grantee, operates, under Ohio laws, as an assignment for the benefit of all creditors *pro rata*.

4. DOCTRINE OF UBERRIMA FIDES NOT APPLICABLE.

The doctrine of *uberrima fides* relates to an attorney, or a person in a fiduciary capacity, who gains some personal advantage at the expense of his client. Therefore, where it appears that a scheme of settlement was arranged between the debtor and his wife, represented by their attorney, and numerous creditors represented by the same attorney, all consented that such attorney should serve as trustee, and he acted in good faith, the doctrine does not apply.

S. W. SMITH, J.

In this case the plaintiff files his petition setting up that the defendant, on May 8, 1896, executed and delivered to him eleven promissory notes for \$22,369.74 for the benefit of certain creditors, and to secure the payment of which he conveyed to him, as trustee, certain property in this city and county. He brings this suit for the sale of the real estate described in said trust deed, making other lienholders and judgment creditors parties defendant; and asks for a sale of said property and distribution of the proceeds thereof. The various defendants have filed their answers or cross-petitions, setting up their claims as may be adjudged by the court.

The evidence in the case shows that Charles H. Hewitt, the defendant, in the city of Chattanooga, Tennessee, was engaged in various mercantile business from 1884 up to August 23, 1893, when he became involved in various undertakings; and, owing to a number of creditors, he executed and delivered the following instruments, in the following order:

1. On August 22, 1893, he executed and delivered to his wife, Elsie W. Hewitt, a deed of his property and interests in Cincinnati and Hamilton county, settling \$30,000 upon himself and child, which was recorded April 5, 1894.

2. On April 16, 1894, he and his wife execute and delivered to Robert Sch lz, defendant herein, their notes for \$14,000, together with a mortgage upon all of the property in which he then had an equitable interest, under the will of his mother, Lucinda C. Hewitt, excepting therefrom the \$30,000 previously deeded to his wife, which mortgage was duly recorded on April 17, 1894, and provided also for the payment of certain premiums of insurance upon the life of said Charles H. Hewitt.

3. On April 28, 1892, he executed and delivered his note to his brother, Samuel L. Hewitt, for \$3,000 and to secure the payment of which, on April 19, 1894, he executed and delivered a mortgage to his brother, Samuel L. Hewitt, upon what is known in this case as the Oakley farm, in which no dower of Mrs. Hewitt was released, mortgage being recorded upon April 21, 1894.

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4. On May 8, 1896, he executed and delivered the eleven promissory notes and deed of trust set up in the petition, to Halbert B. Case, trustee, the plaintiff herein, in which trust deed his wife joined, released her dower and the interest she had by virtue of the deed of settlement of August 22, 1898, in the property in Cincinnati and Hamilton county.

5. On July 18, 1895, the First National Bank of Chattanooga, Tenn., recovered a judgment against the defendant, Charles H. Hewitt, in the sum of \$1,086.20, upon which execution was issued on October 8, 1895, and returned unsatisfied. And on the day of the defendant, the Citizens Bank & Trust Company recovered a judgment against the defendant, Charles H. Hewitt, for the sum of \$—.

It also appears in evidence that the taxes, assessments and charges upon the real estate of the defendant, Charles H. Hewitt, in this city and county, are delinquent and have not been paid.

The above statements set out the liens now existing and in litigation claimed against the property of the defendant, Charles H. Hewitt, and this action is brought to marshal such liens and determine their priority; to do which it is necessary for the court to take up the history of these transactions in their order.

The first is the deed of settlement to Elsie W. Hewitt whereby \$30,000 were set off to her in the property of her husband in this county — \$20,000 for herself and \$10,000 to herself as trustee for their child. The lienholders and general creditors attack this deed of settlement upon various grounds: That the same was made in fraud of creditors; that it is not properly executed; that it is void for want of definite description; that it is an executory contract.

There is no doubt that the deed of settlement is in the nature of a gift from Charles H. Hewitt to his wife, individually, and to his wife as trustee for Charles H. Hewitt, Jr.; and unless the grantor was financially in the condition, at the time, to make such a conveyance, it must be void.

The evidence tends to show that, after being in business for some years in the city of Chattanooga, Mr. Hewitt became greatly involved in that city, prior to August, 1898. He had placed his money in various ventures, had executed his notes, judgments had been taken against him, to such an extent that there was due from him to various creditors over \$57,000, and at the time of the making of this deed of settlement he had not yet come into the actual possession of his share of his mother's estate, and only held an equitable interest therein, as set forth by the terms of her will. Considering the testimony as to the value of this interest or real estate, at that time, together with the fact that he then had no vested estate in this property, there can be no doubt that, at the time the deed of settlement was executed and delivered, there was not sufficient property to meet his liabilities. The testimony varies as to value, some placing it as high as \$81,000, while others place it at about

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\$61,000. Without commenting as to which expert would be correct in his value (for the reason that expert testimony, at its best, is uncertain), the court feels satisfied that when Mr. Hewitt executed and delivered the deed of settlement in favor of his wife and child, he was so involved that at that time had a sale been made of his real estate, considering all the delays incidental thereto, the costs of such sale and expenses, he had not reserved sufficient property to pay his debts, and, as the \$1,000, the value of Elsie W. Hewitt's homestead rights in the Chattanooga property, although a valid consideration, was not a valuable one sufficient in itself to support the conveyance of \$30,000 worth of real estate, and, as a natural sequence of law, Mr. Hewitt, therefore, could not make these gifts to his wife and child. Crumbaugh v. Kugler, 2 Ohio St., 879.

Therefore, without considering the other reasons for setting aside the deed of settlement, that is, as to its proper execution, or as to its being an executory or imperfect gift, the court is of the opinion that at the time the deed of settlement was made Charles H. Hewitt, in law, by the evidence, was not in a condition to make such a deed as the court could or would uphold, and for this reason, the deed of settlement will be declared void.

This brings us to the consideration of the next instrument executed in relation to the property, and that is the mortgage given to Robert Scholze. This mortgage was executed upon April 16, 1894, and covers all the grantor's right, title, interest and estate, both legal and equitable, present and in expectancy, in and to all the real estate, lands, tenements and hereditaments, including leasehold estates, either divided or undivided, situated in the city of Cincinnati, in the county of Hamilton and state of Ohio, which Charles H. Hewitt derived from and has and owns under and by the last will and testament of Lucinda C. Hewitt, his mother, expressly reserving from the mortgage the portion of the property theretofore conveyed by Charles H. Hewitt to his wife, Elsie W. Hewitt, and her son, Charles Hewitt, Jr., in amount \$30,000, which is to be first set off and allotted to the said Elsie W. Hewitt \$20,000 and to the said Elsie W. Hewitt as trustee for her son, Charles H. Hewitt, Jr., \$10,000 in kind, at the market value at the time of said apportionment. All the balance of said real estate, including the said leasehold estates, derived by Charles H. Hewitt by the will of his mother being covered by and conveyed by this instrument.

The court having found that the deed of settlement is void, unless the exception in this mortgage estops Scholze, his mortgage would be the first lien upon the property "in Cincinnati." The court uses the term "in Cincinnati" as distinguished from the property in Hamilton county, as counsel for Scholze claims that this mortgage covers not only property in Cincinnati, but all coming to Charles H. Hewitt in the county.

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In this respect the court is of the opinion that, by the description in the mortgage, it was the intention, and the mortgage so declares, to include in that nothing but the property which might come to Charles H. Hewitt from his mother's estate located in the city of Cincinnati. And while the description, at the latter part of the mortgage, contains the term "All the balance of said real estate, including leasehold estates derived by the said Charles H. Hewitt by the will of his mother, the said Lucinda C. Hewitt, as set out above, is covered by and conveyed by this mortgage," nevertheless this must refer to the balance left in the city of Cincinnati after deducting therefrom the \$30,000 worth, as the part that is particularly granted (that is, in the granting clause) is described as being situated in the city of Cincinnati, in the county of Hamilton and state of Ohio. Therefore, the lien which Robert Scholze obtained, must be upon such property as lies within the city limits.

Therefore, the court having reached the conclusion that the deed of settlement is invalid, it is claimed that, by reason of the exception in the Scholze mortgage, Mr. Scholze is estopped from asserting his mortgage as a prior lien of the settlement.

In this view the court cannot agree with counsel. The deed of settlement failing, the exception failed; and it is the same as though no exception was made, and the party will have the right to enforce such lien as he might have. The mortgage, therefore, would be good, and would stand as the first lien upon the interest or property of Charles H. Hewitt in the city of Cincinnati.

Dittman v. Clybourn, 4 Ills. Appeals, 542; Mooney v. Coolidge, 30 Ark., 640; 9 Lea Tenn., 654.

The next instrument executed by Charles H. Hewitt is a mortgage to Samuel L. Hewitt on what is known as the Oakley farm, in which Mrs. Hewitt did not release her dower. This instrument would fall in the same relation as the Scholze mortgage. For the court having found that the deed of settlement is invalid, and that the Scholze mortgage does not cover any property outside the city of Cincinnati, in Hamilton county, or the Oakley farm.

Counsel for Mr. and Mrs. Hewitt contends that, as against the claim of the mortgagee, the defendant, Charles H. Hewitt, would have the right to set off his share in a claim which he says his brother Samuel L. Hewitt owes to his mother's estate. In this respect, however, this cannot be done, as the mortgage given to Samuel L. Hewitt is for a debt from Charles H. Hewitt to Samuel L. Hewitt; the claim which the defendant, Charles H. Hewitt seeks to set off against this is a claim due the executors of Lucinda Hewitt's estate, and does not belong to the defendant, Chas. H. Hewitt; as the estate of Lucinda C. Hewitt has not been closed, if there is such a claim it would be the duty of the executors to undertake its collection. It would not be right or proper for a court in such a proceeding as this, to allow such a claim as an offset.

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Therefore, so far as the mortgage of Samuel L. Hewitt is concerned, the court would hold that this is the first lien upon the property known as Oakley farm.

The next instrument in order of execution is the one sued upon by the plaintiff in this case, being a trust deed executed by Charles H. Hewitt and wife to Halbert B. Case. This instrument was executed and delivered upon May 8, 1896. This was an instrument reciting that Charles H. Hewitt, being indebted to various parties, executed an instrument to Halbert B. Case for the purpose of paying specific debts, and provided for the manner in which the property should be sold, the payment of expenses of the sale, that out of the proceeds of the sale, after payment of the debts, the surplus, if any, should be paid to him. And it is claimed by the creditors in this case that such a deed has been, in this state, and should be in this case, construed to be a general assignment which inures to the benefit of all creditors.

The language of this trust deed is almost identical with our usual forms of deeds of assignment; and under the decisions in Ohio, the court cannot but feel that this conveyance operates as a deed of assignment, and should inure to the benefit of all creditors who have not liens prior to the deed.

Brinkerhoff v. Smith, 57 Ohio St., 610; Lee v. Hennick, 52 Ohio St., 177; Gashe v. Young, 51 Ohio St., 376; Pendery v. Allen, 50 Ohio St., 121.

The evidence in the mind of the court, shows exclusively that when this deed was made Charles H. Hewitt was utterly insolvent and could not, by any possibility, pay his indebtedness.

So far as the execution of this deed is concerned, as to whether it was properly executed, or not, it is immaterial to decide; for, if the deed operates as a general assignment, then all creditors subsequent to those having prior liens would share *pro rata* in the balance of the property left after paying the prior incumbrances.

Counsel for the First National Bank of Chattanooga insists that the judgment of that bank is a lien prior to any of the subsequent creditors from July 18, 1895; that if this is not true, the suits instituted by the bank on October 15, 1875, as a creditor's bill, would give the bank priority.

Its judgment was recovered July 18, 1895. At this time the legal title to the share of Lucinda C. Hewitt's estate belonging to Charles H. Hewitt was vested in Samuel L. Hewitt and A. Lee McCormick as trustees, by division of said property made in May, 1895; and sec. 5895, Rev. Stat., provides the time from which lands and tenements shall be bound by judgment.

By the decision of this court the fee simple estate to the share of Charles H. Hewitt stood in Samuel L. Hewitt and A. L. McCormick. And in Lawrence v. Belger, 31 Ohio St., 175, the court defines what

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property of a debtor is bound by a judgment, defines the word "lands and tenements of the debtor," and says the origin of judgment liens is found in the English statute of Westminster the second which authorized the judgment creditor to sue out a writ of *elegit*—the command of which was that the officer deliver to the plaintiff a moiety of all the lands and tenements whereof the debtor at the time of obtaining the judgment was seized or at any time thereafter; and held that the judgment was a lien upon the debtor's lands in consequence of the right to take out the writ, and that the lien continues as long as the right exists. Therefore, the division having been made of the property and the interest of Charles H. Hewitt in that property having been set off to him, it would seem that the judgment would be entitled to a preference.

If, however, this contention is not correct, the court is of the opinion that the First National Bank of Chattanooga obtained a priority by reason of the fact that on October 15, 1895, it instituted a suit, under its judgment, to marshal certain liens that were prior to it and to sell the property to satisfy the indebtedness, obtained a priority over the trust deed.

This seems to be the rule laid down in Freeman on Judgments, sec. 377, in which the author says that:

"If the holder of the junior judgment proceeds by creditor's bill to reach assets not subject to execution at law, or to vacate a fraudulent transfer of property liable to execution at law, he thereby obtains precedence over all other judgment creditors, and is entitled to the first proceeds of any property which, by the aid of his suit, is made answerable for the obligation of the judgment debtor."

And this also has been decided in Bowry v. Odell, 4 Ohio St., 623, at page 626, sec. 5464, Rev. Stat.

Therefore, the court's conclusion as to the judgment claim of the First National Bank of Chattanooga is that it obtained a lien prior to any of the creditors named in the deed of trust.

So far as the lien of the Citizens Bank & Trust Company is concerned, the judgement is subsequent to the execution and delivery of the deed of trust, and, therefore, would have no priority.

Counsel for plaintiff has called our attention, in the evidence which the court permitted, to the fact that perhaps many of these debts created by Mr. Hewitt prior to the execution of the deed of trust and the compromises for which the deed of trust was given to secure, were not just and valid debts of Charles H. Hewitt. The court, however, cannot inquire into that, as the debts existed, suit had been brought upon them, and, in order to settle the difficulty existing between him and his creditors, he executed new notes and gave the deed of trust as security. Therefore, as to the actual condition of the debts it is now too late to have the question raised.

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Counsel for plaintiff also argues the doctrine of *uberrima fides*. That is, that the court should scan with scrutiny the dealings had between Mr. Case and his clients, he being counsel for Mr. and Mrs. Hewitt, and also acting as counsel for the various creditors for whose benefit the deed of trust was executed; and cites to the court many authorities upon this point. The doctrine of *uberrima fides*, however, relates to an attorney or a person in a fiduciary relation who gains some personal advantage at the expense of his client. In the arrangement of this matter Col. Case did not secure for himself any property or any advantage. The evidence shows that a scheme of settlement was arranged upon between Charles H. Hewitt and his wife, represented by Col. Case, and numerous creditors, also represented by him, and they consented, and very properly consented, that Mr. Case should serve as a trustee. He acted in good faith, and his advice and actions were not influenced by anything other than the best interests of his clients. And therefore, there is nothing in the case as now presented to the court, involving the question of independent advice.

In conclusion, the court would fix the priorities as follows:

There should be paid out of the proceeds of sale of this property the claims in the following order:

1. The costs of this action.
2. All taxes, rates, charges and assessments against the real estate.
3. The Scholze mortgage, to be taken out of the Cincinnati property only.
4. The Samuel L. Hewitt mortgage, to be taken out of the Oakley farm.
5. The judgment of the First National Bank, Chattanooga
6. The balance to be distributed to all the creditors mentioned in the deed of trust, the Citizens Bank & Trust Company, and other general creditors.

Charles W. Baker, for Charles W. Hewitt.

W. C. Cochran, for Case trustee.

Albert Bettinger, for Robert Scholze.

Judson Harmon, for Samuel Hewitt.

Province Pogue, for First National Bank, Chattanooga.

Arthur Espy, for Citizens Bauk.

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RELIGIOUS SOCIETIES—JUDGMENTS.

[Hamilton Common Pleas, 1900.]

* HORACE W. MALES V. JEREMIAH MURRAY ET AL.

1. DECREE INSUFFICIENT TO CONSTITUTE JUDGMENT.

A decree which merely finds that plaintiffs have a valid claim against an incorporated church congregation, without sentence of judgment that they shall recover, does not constitute a judgment and is not a sufficient basis for a proceeding in aid of execution under sec. 5464, Rev. Stat.

2. CREDITOR'S BILL—INSUFFICIENT CLAIM.

A creditor's bill cannot be maintained under the statute or under the general chancery jurisdiction of the court upon a claim which is not susceptible of being reduced to judgment.

3. JUDGMENT AGAINST UNINCORPORATED CHURCH.

A judgment for money cannot be taken against an unincorporated church as such.

4. MEMBER NOT RESPONSIBLE FOR DEBTS OF CHURCH.*

A member of such church is not responsible for its debts unless he in some way sustained or acquiesced in their creation.

HOLLISTER, J.

Actions were brought in the court in October, 1886, by Ann Manion and Margaret Leydon against John Maloy and others described as "Trustees of the Church of The Atonement," "George R. Holzam, treasurer of the trustees of the Church of The Atonement," "James M. Carey, pastor of the Church of The Atonement," "William Henry Elder, Archbishop of the Roman Catholic Church for the diocese of Cincinnati," and Margaretta Graf, alleging that the Church of the Atonement was an unincorporated religious society; that the title to all property or churches of the Roman Catholic church is held by the archbishop for the use of the congregation of each church; that the property of each congregation is under the government of its trustees, who are authorized to make loans, and are agents of the archbishop for that purpose; and that the pastor of each church acts for the trustees and is their agent in receiving money and causing obligations to be issued by the church to its creditors.

It was further alleged that the real estate of the Church of the Atonement was conveyed to Archbishop Purcell in 1873 in trust for the advancement of religion, and the assumption by him of the indebtedness of the church, amounting to \$23,000, which he paid; that after that and prior to March 1, 1879, the church repaid him \$8,000 of the amount advanced by him, leaving \$15,000 due on account of the indebtedness of the church which he had assumed to pay for it; that it was then agreed, and prior to March 1, 1879, between him and the pastor and trustees,

* For other decisions in this case see Mannix v. Comrs., 10 Dec. Re., 18; Purcell In re, Id., 802; Comrs. v. Mannix, Id., 189. See also 43 O. S., 210; also 1 Circ. Dec., 36 6 Circ. Dec., 820.

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that he would cancel the debt and hold the legal title solely as trustee, the church repaying to him the \$15,000; that at time the Archbishop was indebted to the plaintiffs and others, he having substituted his notes to them in place of notes held by them against the trustees of the church; that the archbishop having become financially embarrassed, and it being recognized by the pastor, Father Cusack, and the trustees, that the debt of the archbishop was really the debt of the church, and should be paid by the church, the owners of his notes assigned them to the church and received for them the notes of the pastor.

It was further alleged that Ann Mauion and Margaret Leydon held the archbishop's notes and released him therefrom and assigned them to the church, receiving the notes of Patrick H. Cusack, pastor, by which the congregation agreed to pay the amount thereof.

It was further alleged that the district court held in Mannix, Asignee, v. Purcell, 10 Dec. (Re.) 817, that the church owed Purcell nothing, and that he held the legal title only in trust for the church.

The plaintiffs stated that Margaretta Graf claimed some interest and that she be required to set it up by her answer.

The prayer of both petitions were in this language:

"Wherefore plaintiff asks that the amount as aforesaid due her from said Church of the Atonement be declared the first and best lien upon said premises above described (which premises were the church edifice in which the congregation of the Church of the Atonement were accustomed to worship); that unless said Church of the Atonement pay the amount by a date to be named by the court, said church property be sold and the proceeds employed to pay said plaintiff's claim; and for such other and further relief as in equity and good conscience this plaintiff can ask."

Margaretta Graf filed an answer and cross-petition denying the indebtedness of the plaintiffs, but substantially admitting their other material averments, and alleged that the Sisters of Mercy built the church, expending large sums of their own and borrowing \$23,000 upon the faith of the property, to which those who loaned the money looked for payment, and that of that sum about \$12,000 was due to Edward Purcell, the brother of the archbishop; that the property was conveyed by the sisters to the archbishop substantially as alleged in the petitions, and was made in his hands subject to the debt of \$23,000. She averred that the archbishop, by such assumption, became vested with an equitable lien in the church property to that extent; that the congregation recognized this lien and had paid by February 1, 1879, some \$8,000 thereon; that in February, 1878, John B. Purcell executed a promissory note to Edward Purcell for \$3,624.28, payable in one year; that she had advanced this sum to John B. Purcell, and that the note was immediately endorsed over to her; that to secure the note John B. Purcell, then holding the title to the church property, mortgaged it to Edward, who

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assigned it to her, who caused it to be recorded December 14, 1878; and that the condition of the mortgage having been broken, it had become absolute.

She further averred that the amount due her was a part of the \$23,000 owed by the congregation to the archbishop from the payment of which he had been released and that from time to time the congregation had paid to her certain sums on account.

She claimed that the mortgage was the best lien upon the property, and prayed as follows:

"Wherefore this defendant prays that the said note and mortgage may be declared to be the first and best lien on the said premises; that the said congregation or the said William Henry Elder, trustee of the said congregation, be ordered to pay the same, or in default thereof that the property described in the petition may be sold and the proceeds be applied to the payment of the amount so due, with interest, and that she may have such other and further relief as she may be entitled to at law or in equity." These allegations were denied by the plaintiffs, who claim further that Father Cusack and the congregation had no knowledge of the Graf debt; that that amount was his personal debt and had never been the debt of the congregation; and prayed as in their original petitions, and to adjust the priorities of plaintiff's lien and that of Margaretta Graf, and that if she had no lien that her cross-petition be dismissed and for all proper relief.

Thereupon came Catherine Haslam, who was made a party by leave of court and filed an answer and cross-petition, showing that she had surrendered her note against the archbishop and had accepted in lieu thereof the note of the congregation signed by Father Cusack, dated February 18, 1879, payable in one year, upon which certain sums had been paid by the congregation. She claimed the balance due her and said:

"She further says that by reason of the premises she is entitled to a lien upon the premises and to a sale thereof, she prays judgment for the amount of her claim; that the case be referred to a master to ascertain the amount of indebtedness against the property, and that said premises be sold."

And Michael Schultz also by leave of court filed his answer and cross-petition claiming that he had prior to December, 1874, under employment of August Homan, pastor of the church, equipped it with heating apparatus, had remodeled the pews and fitted up the basement for use as a parochial school; that the pastor had power and authority, acting for the trustees, to contract reasonable expenses for the preservation, necessary repairs and improvement of the church property, and that his work and materials contributed to that end.

He alleged that for the amount due him a note of the congregation, payable in one year from December 10, 1874, was given to him, signed

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by August Homan, pastor, on which he had been paid \$1,000 by Father Cusack, who succeeded Father Homan. He prayed as follows:

"Wherefore this defendant prays judgment in the sum of \$926, with interest from August 18, 1876, at eight per cent.; that his said claim may be declared a lien upon the premises described in the petition; that said premises may be sold and his said claim be first paid out of the proceeds thereof, and for all other and further relief to which he may be entitled."

The Church of the Atonement was not a party to the suit, nor was the congregation of the Church of the Atonement. No summons issued against either, and no summons issued upon the cross-petitions of Haslam and Schultz against anybody. No precipes were filed with those answers and cross-petitions; nor was any one of the defendants specifically named as owing money to the cross-petitioners. Such proceedings were eventually had in these actions that a decree was entered in the circuit court November 4, 1895, wherein it was found that "the equity of the case is with the appellant, Mrs. Margaretta Graf;" that her mortgage was the first and best and only lien upon the church property, and that there was due her the sum of \$6,211.96, with interest from January 7, 1895, and in the decree appears this language:

"Wherefore it is considered, adjudged and decreed that unless the congregation of the Church of the Atonement, or some one in its behalf, shall pay or cause to be paid to the said Margaretta Graf the sum of \$6,211.96, with interest as aforesaid, within sixty days from the entry hereof, the equity of redemption under said mortgage shall be forever foreclosed and an order of sale shall issue to the sheriff of Hamilton county commanding him to sell said premises as upon execution at law free from the claim of all parties to this action. The court further finds that none of the other parties to this action other than appellant, Mrs. Margaretta Graf, have any lien upon the premises described in the petition and in said mortgage, but that they have valid claims against the said congregation of the Church of the Atonement; that the following parties are entitled to recover from said congregation the amounts respectively set after their names, with interest from the seventh day of January, 1895, to wit:"

Then follows a list in which are found—

"Catherine Haslam, the sum of \$4,914.33. The Covington Trust Co., administrator of Michael Schultz the sum of \$1,890.13."

"The court further orders that unless the said claims last named shall be paid within the sixty days hereinbefore described, they be paid *pro rata* as among themselves out of the surplus proceeds of sale that may remain after the payment of the mortgage held by the appellant, Mrs. Margaretta Graf."

Thereupon the case was remanded to this court for execution in accordance with the terms of the decree, and the property was sold under

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such proceedings to one Hoban for \$6,000, but no return had been made by the sheriff, and the congregation had collected several thousand dollars for the purpose of taking the bid off of Hoban's hands and having the sale confirmed in its representatives.

On November 16, 1895, the children of Michael Schultz assigned their interest in the Schultz note and in the litigation, to Horace W. Males.

On July 19, 1897, Males and Catherine Haslam filed separate petitions in this court against Jeremiah Murray, Henry Moeller, William Henry Elder, George Holzam, John Boland, the Church of the Atonement and Nicholas J. Hoban, alleging that they had recovered judgments in the circuit court for \$1,890 13 and \$4,914.33, respectively, with interest from January 7, 1895, against the Church of the Atonement; that the judgments were in full force and unsatisfied; that the Church of the Atonement was insolvent and had no property of any kind subject to execution; that the church through its trustees, Holman and Boland, and its pastor, Murray, had accumulated a fund of \$8,000, which had been placed in the hands of Moeller to hold in trust for the church. Both petitions concluded with this prayer:

"Wherefore plaintiff prays that all of the defendants herein may be required to answer the petition fully and truly, setting up and declaring in their respective answers the nature and extent of their respective claims to the aforesaid sum of \$8,000; that said sum of \$8,000 may be subjected to the plaintiff's judgment for costs and all relief to which plaintiff may be entitled in the premises."

The preface in each petition was as follows:

"The clerk will issue summons for all within named defendants. Action to subject assets to payment of judgment."

The return of the summons shows that the individuals named as defendants were served and contains the following:

"Also served Church of the Atonement by delivering a true copy of this writ with all the endorsements thereon indorsed to Jeremiah Murray, pastor of said church."

Then came Messrs. Moeller, Elder, Boland, and Hoban and denied all of the allegations in these petitions, and came also Messrs. Murray and Holzam, whose answers are also in effect denials.

The actions of Haslam and Males are proceedings in aid of execution brought under sec. 5464, Rev. Stat., which reads:

"When a judgment debtor has no personal or real property subject to levy on execution sufficient to satisfy the judgment, any equitable interest which he has in real estate * * * claim, or chose in action due or to become due to him, or in any * * * money, goods or effects which he has in the possession of any person * *. * shall be subject to the payment of the judgment by action."

The plaintiffs claim that the decree of the circuit court in *Manion and Leydon v. Malloy*, 6 Circ. Dec., 820; * * * is a judgment, and base their actions upon it.

The decree is not a judgment for money against the congregation of the Church of the Atonement, or against the Church of the Atonement, or against any of the defendants. It is a mere finding that Haslam and Schultz had valid claim against the congregation of that church which they are entitled to recover from it. There is no sentence of judgment of the court that they shall recover. There is nothing definite about it. It is not sufficient to constitute a judgment. *Black on Judgments*, sec. 115; *Doyle v. West*, 60 Ohio St., 438.

These suits cannot therefore be maintained under sec. 5464, Rev. Stat. "But to be entitled to the benefit of that law," says Avery J., "he (the creditor) must have established his right by obtaining a judgment, and then the aid of chancery may be invoked where there is no legal estate to satisfy the judgment." *Clark v. Strong*, 16 Ohio, 318, 323.

But while the finding is not a judgment it "is a debt evidenced by record, and can only be discharged by payment." Hence, an action may be brought to recover the amount found due. *Doyle v. West*, 60 Ohio St., 438, 444. Such action is necessarily for money only, for the circuit court expressly found that Haslam and Schultz did not have liens.

It is undoubtedly true that the general chancery jurisdiction in Ohio is as broad as that exercised by courts of chancery in England. *Hulse v. Wright*, 4 W., 61, that equity will reach the property of a debtor justly applicable to the payment of his debts even where there is no specific lien, but "unless the suit relates to the estate of a deceased person, the debt must be established by some judicial proceeding, and it must generally be shown that legal means for its collection have been exhausted." *Public Works v. Columbia College*, 84 U. S. (17 Wall.), 521.

It is also true that in an action known as a creditor's bill, it is not necessary to actually issue an execution of the judgment, but it is sufficient if the bill allege that the debtor has no goods upon which to levy, and that fact is proved. *Bomberger v. Turner*, 18 Ohio St., 263; *Piatt v. St. Clair*, 6 Ohio, 227; *Gilmore v. Miami Export Co.*, 2 Ohio, 294. And suits against stockholders to recover upon their double liability are held to be analogous to creditor's bills. *Umsted v. Buskirk*, 17 Ohio St., 114.

In those it is not necessary to recover a judgment against the corporation as a preliminary to the enforcement of the liability when the incorporation is insolvent or has made an assignment. *Morgan v. Lewis*, 46 Ohio St., 1; *Barrick v. Gifford*, 47 Ohio St., 180. Yet it is probably safe to say that no creditor's bill could be maintained either under the statute or under the general chancery jurisdiction of the court upon a claim which is not susceptible of being reduced to judgment.

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The finding in the circuit court was against the congregation of the Church of the Atonement. Assuming that the court could make in the case before it a binding decree or a finding against that aggregation of persons, it would be necessary for the plaintiff in the creditor's bill to work out his rights through the same party. Hence, the proper party defendant to his bill would be the "congregation of the Church of the Atonement." The necessary conditions are not satisfied by suing the "Church of the Atonement" as the debtor whose credits are to be reached by the bill. The cases brought do not pretend to make the congregation of the Church of the Atonement a party or parties defendant. The church being unincorporated, no judgment for money can be taken against it as such.

Burton v. Grand Rapids, 31 S. W., 91; Nightingale v. Barney, 4 Greene, Iowa, 106-107; Detroit v. Detroit, etc., 6 N. W., 675; Lewis v. Tilton, 64 Iowa, 295, 297, 298; Hajcek v Benevolent Society, 66 Mo. App., 568, 571; Niven v. Spickerman, 12 Johns, 401; Lloyd v. Loaring, 6 Vesey, 773, 777. Strong on the relation of Civil Law to Church Polity, p. 71—quoted in Baxter v. McDonnell, 155 N. Y., 93.

The result is if the finding means anything, still assuming that it could legally be made, the entire congregation of the church, or anybody else making it up, must be made parties. It is true that—

"When the question is one of a common or general interest of many persons, or when the parties are very numerous and it is impracticable to bring them all before the court, one or more may sue or defend for for the benefit of all." Sec. 5008, Rev. Stat.

But no allegation is made in the petitions of such a nature as to bring the case within that law. If the petitions could be maintained at all on the finding, it must be under the general chancery jurisdiction of this court to entertain a creditor's bill irrespective of the statute.

"It was the general rule in chancery before the adoption of the civil code," says Judge Williams, "that suits must be prosecuted by the real parties in interest, and that all who were united in interest must be joined." Platt v. Colvin, 50 Ohio St., 703, 708.

There were exceptions all fairly covered by sec. 5008, Rev. Stat., but it may safely be asserted that when a pleader wants to bring his case within the exception to a general rule of law he must make his allegation accordingly. It is not alleged that the individuals named constitute that congregation, and if it were, the statements of the petitions are not sufficient to charge them personally. And it is not claimed that they are individually liable. Even if all the individuals were named as defendants who were members of the congregation when these suits were brought, it is admitted that the congregation has changed materially in its personnel since the finding of the circuit court was made. But if it were claimed that the individuals thus named were personally liable, such claim could not be maintained. It was held in DeVoss v. Gray, 22

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Ohio St., 159, that a member of an unincorporated religious society is not responsible for its debts unless he in some way sanctioned or acquiesced in their creation. And this is a general rule. *Higdon v. Gardner*, 1 Circ. Dec., 519; *Kupfer v. South Parish*, 12 Mass., 185; 4 *Thompson on Corporations*, sec. 5167.

It is not alleged, nor is there any evidence tending to show that any of the individuals named as defendants came within this rule; nor can the suits be maintained on the theory that they seek to fix a lien upon the fund in the hands of the pastor of the church or in charge of any of the defendants, for while it is shown that there is a sum of money in the hands of the pastor to be used in acquiring the church property from the purchaser at the sheriff's sale, the circuit court has said that the plaintiffs in the action pending there in which the finding was made, had no lien on the church edifice. The court is not able to see any difference in principle between property in which the congregation worship and in which they all have an equitable interest represented by a church building, and personal property held by an individual, the equitable title to which belongs to the members of the congregation.

If claims of the kind the plaintiffs have in the Manion and Leydon cases could not be made liens upon the church edifice, claims such as are represented by the plaintiffs in these cases, cannot be liens against a fund held by the pastor of the church in which the congregation of the church have an equitable interest. The plaintiffs then have no lien on this fund. Hence, the actions cannot be maintained for the establishment and enforcement of equitable liens.

In whatever way the cases may be viewed, the court is unable to see how they can be maintained. But if these conclusions are not sound, yet the court is of opinion that for another reason the actions must fail. The suits in the circuit court were against the certain individuals named as "Trustees of the Church of the Atonement," their treasurer, the pastor of the church, the archbishop, and Margaretta Graf, the object of the suits being to establish a lien upon the church property.

Mrs. Graf, in her cross-petition, said the same thing, and prayed that the property be sold to pay the liens.

Haslam claimed that she was entitled to a lien. It is true she prayed judgment for the amount due her after it had been ascertained by a master, and that the property be sold to pay her, and Schultz also prayed judgment, and that his claim be declared a lien upon the premises, and that it be paid out of the proceeds of sale; but it is clear that the relief they were seeking was not a money judgment against anybody, but only a distribution from the proceeds of sale.

They were not, however, entitled to a money judgment against the congregation of the Church of the Atonement. In the first place, neither the congregation nor the church were before the court. In the

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second, such unincorporated association as the Church of the Atonement was, could not be sued for money as shown heretofore.

If it be assumed that in actions such as the circuit court had before it, a money judgment could have been rendered, yet it must be held that the court could not render any money judgment or make any finding which would be binding except upon parties who were before the court. The statutory requirement of sec. 5037, Rev. Stat., is that when the action is for the recovery of money only, the summons shall contain the endorsement of the amount claimed and interest for which judgment will be taken upon default. And it has been held in *Thatcher v. Dickinson*, 2 Circ. Dec., 82, that a personal judgment cannot be rendered upon a cross-petition without a summons issuing thereon when the debt is in default to the original petition.

If neither the Church of the Atonement or the congregation of the Church of the Atonement, were before the court upon the petition, how much less could a cross-petition be maintained which did not bring them in?

The court in the cases before it, had not acquired jurisdiction of the person against which this finding was made. It could not, therefore, make a valid finding. This court has hesitated long before reaching the conclusion that it was not within the power of the circuit court in the cases before it to make the finding which is the basis of the suits this court is called upon to adjudicate. And the court is not relieved from considering the question by the argument that the judgments and findings of courts of record cannot be attacked collaterally, for the attack that is made in these cases by the defendants is not collateral in its nature, but is direct as the Supreme Court have said in *Kingsborough v. Tousley*, 56 Ohio St., 450. Judge Ranney lays down the rule which must govern us. *Sheldon v. Newton*, 3 Ohio St., 494, 499. He says:

"The power to hear and determine a cause is jurisdiction and it is *coram judice* whenever a case is presented which brings this power into action. But before this power can be affirmed to exist it must be made to appear that the law has given the tribunal capacity to entertain the complaint against the person or thing sought to be charged or affected; that such complaint has actually been preferred; and that such person or thing has been properly brought before the tribunal, to answer the charge therein contained."

Further authority might be found in *Spier v. Corll*, 33 Ohio St., 236; *Spoors v. Coen* 44 Ohio St., 497; *Windsor v. McVeigh*, 39 U. S. (14 Pet.), 274; *U. S. v. Walker*, 109 U. S., 258, 265-267; *Ex parte Nielson*, 181 U. S., 176, 188-185. *Fithian v. Monks*, 43 Mo., 502, 250-253; *Seamster v. Blockstock*, 83 Va., 232; *Folger v. Columbia*, 99 Mass., 267, 273-274; *Adams v. Jeffries*, 12 Ohio, 253.

The court upon these authorities, is constrained to hold that the objects of the suits in the circuit court was to establish and enforce liens

upon church property, and that the judgment prayed for in the cross-petitions of Schultz and Haslam did not mean that the cross-petitioners desired money judgment in a legal sense, but only that the amount due them might be found, and that it be paid out of the proceeds of sale when their liens were established; and therefore the court had no jurisdiction to enter a money judgment upon which an execution could issue, and, if this conclusion is incorrect, that the court failed to acquire jurisdiction of the person of the congregation of the Church of the Atonement, or the Church of the Atonement; and hence its finding purporting to bind either is not valid.

The petitions of the plaintiffs must, therefore, be dismissed.

D. S. Oliver, and G. J. Murray, for plaintiffs.

J. L. Lincoln, for defendants.

BOND—POLICE OFFICER—ARRESTS.

[Superior Court of Cincinnati, Special Term, May, 1900.]

JEFFERSON REIDY V. PHILIP DEITSCH, CHIEF OF POLICE.

1. POLICE OFFICER'S BOND—SURETIES—SUIT FOR DAMAGES.

Sureties on a bond of a member of the police force, under sec. 1882, Rev. Stat., can be subjected to liability only upon judgment against such officer. They cannot, therefore, be joined in the original action against the officer for damages.

2. SUPERINTENDENT OF POLICE—LIABILITY.

A police superintendent is not liable in damages for the illegal acts of police officers under him in which he did not participate. The liability in such cases is upon the officers who committed the illegal acts.

3. RULE AS TO LIABILITY FOR ARREST AND DETENTION.

A police superintendent who orders an arrest and detention is not liable in damages if there is probable cause for his action or if circumstances are sufficient to raise a strong presumption that the person has committed an offense or is a suspicious character, dangerous to the community, although it afterwards appears that the person so arrested is innocent.

4. FRIVOLOUS EXCUSE WILL NOT SHIELD OFFICER.

Frivolous excuses or pretexts will not shield a police officer who arrests and imprisons a person without a warrant and without an offense being committed in his presence.

5. PERSON ARRESTED MAY BE PHOTOGRAPHED.

Where the superintendent of police had reasonable ground to order an arrest he is justified in having a picture of the person so arrested taken and placed in the rogues' gallery.

6. DUTY TO REMOVE PHOTOGRAPH OF INNOCENT PERSON.

But when it appears that the person so arrested and photographed is innocent it becomes the duty of the superintendent to have his picture removed from the rogues' gallery, and if he thereafter allows such picture to remain there, he is liable for publishing a libel on such person.

7. REMOVAL WITHIN REASONABLE TIME AFTER NOTICE.

Unless the superintendent ordered the photograph taken and placed in the rogues' gallery, no duty devolved upon him in respect to its removal until he knew that the photograph of such person, after he had been released, was in the gallery and he failed, after a reasonable length of time, to have it removed.

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CHARGE TO THE JURY.

JACKSON, J.

Gentlemen of the Jury: This is an action brought by Jefferson Reidy against Philip Deitsch, Caleb Dodsworth and Herman P. Goebel, in which the plaintiff seeks to recover against the three parties defendant upon two causes of action.

Upon motion of counsel for Caleb Dodsworth and Herman P. Goebel, defendants in this case, the court has ordered a judgment in favor of those defendants, Caleb Dodsworth and Herman P. Goebel, because it appears that they were bondsmen upon Colonel Deitsch's bond, and the statute in such case seems to provide that the bondsmen are liable to answer only for a judgment, which has been rendered against a police officer, and as no judgment has yet been rendered, they are properly dismissed from this action. Any verdict, therefore, that you may render in favor of the plaintiff against the defendant, will be against Philip Deitsch only.

The plaintiff, Jefferson Reidy, seeks to recover from the defendant, Philip Deitsch, upon two causes of action, upon each of which he asks damages at your hand in the sum of ten thousand dollars.

The first cause of action sets forth the claim, that the defendant is now, and has been since June 21, 1886, the superintendent of police in the city of Cincinnati; that as such superintendent of police he duly executed a bond to the city in the sum of ten thousand dollars for the faithful discharge of all and singular the several duties pertaining to his office, and by which bond he became bound to pay any damages that might be adjudged against him for the illegal arrest or imprisonment or injury of any person by him; that on September 6, 1898, the defendant, as superintendent of police, illegally and with force arrested the plaintiff, and without any reasonable or probable cause therefor unlawfully imprisoned plaintiff, and unlawfully detained him in prison without any reasonable or probable cause for the space of about forty-eight hours; and for this the plaintiff asks damages at your hands in the sum of ten thousand dollars.

For a second cause of action the plaintiff claims, that after he was so arrested and detained, the defendant, Deitsch, as superintendent of police, caused the photograph of the plaintiff to be taken, and wickedly, falsely and maliciously caused said photograph to be placed in the Bertillon Gallery, which gallery, plaintiff claims, is composed of the pictures of thieves, rogues and other criminals,—thereby wickedly, falsely, maliciously and libelously publishing the plaintiff as a thief, rogue or other criminal; and for this act he also asks damages in the sum of ten thousand dollars.

The evidence adduced at the trial of the case disclosed two claims, upon which the plaintiff relies in support of his second cause of action.

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The first is, that the defendant, Philip Deitsch, himself ordered the photograph taken for the purpose of having it kept and exhibited in the Bertillion gallery. The plaintiff claims and testifies that Deitsch personally ordered this done, while the defendant himself and others in corroboration of it have testified that the defendant did not personally have anything to do with originally ordering this photograph taken and placed in this gallery. This disputed question of fact is one exclusively for your consideration and determination.

In passing, I will say to you, that the burden of proof is on the plaintiff to establish the fact by a preponderance of the evidence. And as I have had occasion to say to you before, by a preponderance of the evidence I do not mean, that the plaintiff is necessarily bound to call more witnesses than the defendant, nor do I mean, that, if the defendant has called more witnesses than the plaintiff, the plaintiff has failed in the establishment of that preponderance which the law requires, but by that I mean that measure and character of evidence which is necessary to carry force and conviction to your minds; and you yourselves can judge from the witnesses as they appear upon the witness stand, and disregard any testimony of any witness, or any number of witnesses, in whole or in part, as you see fit.

And the second claim of plaintiff on the second cause of action is, that, conceding for the argument that Philip Deitsch did not personally order this photograph taken and placed in the gallery, nevertheless said Philip Deitsch, after the arrest and imprisonment of plaintiff, ordered his release, and that no specific charge was ever proved or made against plaintiff; and furthermore, that about April 15, 1899, Superintendent Deitsch was directly informed that such photograph was in the gallery, and that, notwithstanding the fact that he had ordered the release of plaintiff and thereby knew or should have known that he was not a thief or criminal, he, as superintendent of police, having direction and control of the police department, failed to have said photograph removed, and permitted it to remain there on exhibition as that of a thief or a criminal. For the alleged conduct of Deitsch in both these respects plaintiff claims that he has been libeled, and asks for damages in the sum of ten thousand dollars.

The answer admits that the defendant is the superintendent of police and executed the bond in question, and denies all the other allegations as claimed in the petition.

The first thing, gentlemen of the jury, for you to consider is this : Was the plaintiff illegally and without probable cause imprisoned and deprived of his liberty by the defendant, Philip Deitsch? It is not claimed by the plaintiff that he was actually arrested by Superintendent Deitsch. He claims that he was without justification and without probable cause arrested at the post office building by two police officers without a warrant therefor, that he was brought by said officers before

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Superintendent Deitsch, and that said Deitsch himself without any investigation and without probable cause or justification therefor ordered his detention in prison, and ordered his photograph taken as aforesaid.

In considering this cause of action, or this branch of the case, the first thing for you to determine is the question whether as claimed by the plaintiff; Deitsch did actually order his imprisonment and detention, or, as claimed by the defendant, he, the defendant, took no part in this and had no knowledge of it, and ordered plaintiff's release as soon as he knew from the aunt of plaintiff about the detention.

In considering this question, I charge you, that the burden of proof is upon the plaintiff, and he is bound to establish this fact by a preponderance of the evidence under the rules which I have heretofore laid down. If you find the fact in this respect to be as claimed by Deitsch, then I charge you that the defendant is not liable for the imprisonment and detention of plaintiff, because as a matter of law a superintendent of police is not liable for the illegal acts of any police officers under him, in which acts he has not participated. Under such circumstances the officers who made the arrest and those who ordered the detention might be liable, but Deitsch would not be.

If, however, you find, as claimed by the plaintiff, that Deitsch did order his imprisonment and detention, then you will consider, whether Deitsch had probable cause for so doing, or whether he acted recklessly and without probable cause in the matter.

Generally speaking, a police officer who arrests, or one who orders the imprisonment of a person without a warrant for the arrest and without any offense being committed in the officer's presence, does so at his peril. But this is not the universal rule. If the circumstances of the case are such as to raise a strong suspicion in the mind of the officer that a person has committed an offense against the law, or that a person is a suspicious character and dangerous to the community, and if the circumstances were such as should reasonably warrant an officer, acting as an ordinarily careful, prudent officer should under the circumstances, in so believing, so that there would exist probable cause for such action, then such officer would not be liable for the arrest or detention of one without a warrant and without an offense being committed in his presence, although it afterwards turns out that the party is innocent. But there must exist probable cause for an arrest or imprisonment when an officer acts without a warrant, and when no offense has been committed in the officer's presence ; and light, frivolous excuses or pretexts will not suffice to shield an officer, who arrests or imprisons one without a warrant and without an offense being committed in his presence. The liberty of the citizen is too sacred to be thus lightly dealt with.

You, gentlemen, are to say from all the facts and circumstances of this case whether there was or was not probable cause for the arrest and

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detention of the plaintiff. I will say to you as a matter of law, that the fact, that the plaintiff was pushing his way through a crowd and that he had money and a watch on his person, would not of itself be sufficient to constitute probable cause so as to excuse an officer for arresting him or another officer for detaining him. But if the plaintiff's general manner was suspicious, and if, as claimed by the officers who arrested him, he had a watch and broken chain in his trousers' pocket, and if he refused when apprehended to give any reasonable or satisfactory account of himself, and if the presence of large crowds in the city at that time should make officers especially cautious of pickpockets and thieves, then I say to you, that a reasonably prudent, careful officer would be justified in suspecting that a crime had been committed or that plaintiff was a suspicious character, and then there would have been probable cause for arrest; and under these circumstances, if all these facts and circumstances were laid before the defendant Deitsch, as superintendent of police, then he would have been justified in ordering the defendant imprisoned, and in detaining him a reasonable time, even though the plaintiff was innocent.

Gentlemen, you have heard the evidence; you know there is quite a dispute as to what the young man was actually doing, what the fact was about the broken chain and watch, and where he had it, etc. Those facts are for you to determine, and after determining the facts you will apply the rules of law as I have given them to you. But as I have said, you must first find that Superintendent Deitsch did, as claimed by the plaintiff, actually order the plaintiff's imprisonment. If you find that Deitsch did order the imprisonment of plaintiff, and that there was not probable cause for the arrest and that no probable cause therefor was made to appear to Superintendent Deitsch under the rules I have laid down to you, then he would be liable in damages for a false and unlawful imprisonment.

And in estimating those damages the rule is, as stated in charge No. 6, which I shall read as a part of the general charge:

"If your verdict is for the plaintiff, you should award such damages as shall reasonably compensate the plaintiff for the wrong done him. You may take into consideration the injury to his feelings, his mental suffering, the damage done to his reputation and all the other elements which combine to make up the injury naturally flowing from such wrong or wrongs, and if you find that said defendant's act or acts, for which you award damages, were characterized by a careless or wanton disregard of, or indifference to the rights of the plaintiff, then you may also award to the plaintiff what are known as punitive damages in an amount which will serve as a punishment to the defendant for his violation of plaintiff's rights, and which will serve to warn others in a similar position from a similar abuse of power, and in such punitive damages you

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may also include reasonable and proper attorney's fees of the plaintiff in this cause."

Now, gentlemen, as to the claim stated in the second cause of action, that defendant wilfully and maliciously had plaintiff's photograph taken and placed in the Bertillion gallery, I charge you here that the first thing for you to consider is: Was this done by the direction of Deitsch, as claimed by plaintiff, or was it done by someone's else direction and without the knowledge of defendant, as claimed by the defendant? In the latter case the defendant, Deitsch, would not be liable on the claim for ordering the photograph taken. If, though, you find, as claimed by the plaintiff, that this photograph was ordered to be taken and placed in the gallery by the direction of Superintendent Deitsch, then I charge you that if Deitsch had reasonable grounds for causing the imprisonment of plaintiff under the rules I have given you, he also had reasonable grounds for his action in originally ordering the photograph taken and placed in the gallery, and he would not be liable on this claim of plaintiff.

But if Superintendent Deitsch did in fact order the imprisonment of plaintiff, and did order his photograph taken for this gallery, then, after he had ordered the release of plaintiff at the instance of plaintiff's aunt, and there being no offense proven or charged against the plaintiff, it would then become the duty of the defendant to have that photograph removed from a gallery set apart for the photographs of rogues and criminals. Under such circumstances, if you find those to be the facts, that Superintendent Deitsch ordered the imprisonment, and ordered the taking of the photograph, and ordered the release of the plaintiff, and nevertheless thereafter allowed the photograph to remain in the gallery, I say, under those circumstances the conduct of the defendant in permitting the photograph to remain in the gallery would constitute a continuous publishing of the fact, by means of a photograph, that the plaintiff was a thief, rogue or other criminal; and, inasmuch as the defendant has not attempted to justify by showing that the plaintiff was a thief, rogue or other criminal, he would be liable for publishing a libel on plaintiff. Hence, the importance of your determining whether Deitsch did actually order that photograph taken and placed in that gallery, and the importance of determining that is a question of facts. If he did, then he is liable in damages for not having the photograph removed; if not then clearly no duty devolved on him in this respect, until he knew of the fact that the picture was there, and that it was the picture of a man he had ordered to be released.

This brings me to consider the last claim of plaintiff, that the defendant is liable in any event for not causing the photograph to be removed after he was advised by Mr. Hunt of its presence in the gallery. On this branch of the case there is little for me to say to you, except that, even if the defendant Deitsch did not order the plaintiff imprisoned and did not order the photograph taken as claimed by the plaintiff, still I repeat

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here as a part of my general charge, the language of the special charge which I have given:

"If you find that the defendant caused the plaintiff to be released from custody after being satisfied that there was no cause for holding him, and if you find that after so doing, on or before the 15th of April, 1899, the defendant learned that a picture or pictures of the plaintiff were in what is known as the Bertillion gallery, or collection of pictures of criminals and thieves in the police department of the city of Cincinnati, and that the said defendant did not then on obtaining this information, or within a reasonable time thereafter, remove said pictures, or destroy them, and did not take any steps to cause them to be removed or destroyed, and if you find that as the superintendent of the police of the city of Cincinnati, and as such having command and control of the police force of said city, he thereafter knowingly permitted any of said pictures to remain in said gallery or collection, knowing that the picture or pictures would be exhibited or shown among the pictures of criminals and thieves, then I charge you your verdict should be for the plaintiff."

I have stated to you, that a superintendent of police is not liable for the acts of his subordinates in which acts he does not participate: that he is not liable on that principle of law that makes a master liable for the acts of his servants, or a principal liable for the acts of his agents. But inasmuch as the superintendent of police has command and control of the police department, if he knowingly permitted another officer under him to keep and exhibit, as the photograph of a rogue or a criminal, the photograph of a man, whom he had released, and against whom there was no charge proven or made, he thereby directly made himself a party to such act and is liable therefor.

Before you can find for the plaintiff in this respect you must of course find that the defendant knew, himself, or that he was told by Mr. Hunt, that the photograph of plaintiff, so on exhibition in the gallery, was the photograph of a man whom he had ordered to be released.

If you find for the plaintiff in this respect, you will consider the damages which he is entitled to recover, and for that purpose I state to you, that the measure of damages is as heretofore stated and as I have just read to you.

If you find for the plaintiff solely upon the claim, that Superintendent Deitsch permitted the photograph to remain in the gallery after April 15, 1899, and not in favor of the plaintiff upon other claims, that Superintendent Deitsch ordered his imprisonment, and ordered the photograph taken, the damages of course will be those which he has sustained since April 15, 1899, by reason of the fact of the photograph being allowed to remain in the gallery; and no damages should be assessed, in such case, on account of the original arrest and detention and the original taking of the photograph.

Cline v. Springfield.

MUNICIPAL CORPORATIONS—GAS COMPANIES.

[Clark Common Pleas.]

JAMES R. CLINE v. SPRINGFIELD.**1. CITIES MAY REQUIRE REPORTS FROM GAS COMPANIES.**

A municipal corporation, having authority to regulate the price of gas, has, as incidental thereto, power to require gas companies to furnish annually such information and data, exclusively in their possession, as will enable the council to act intelligently in fixing a price for gas which will be reasonable and just to the public and to the gas company.

2. ORDINANCE INCLUDES NATURAL GAS COMPANIES.

The term "any gas company," when used in such an ordinance, is general and comprehends natural as well as artificial gas companies, although, at the time of the passage of the ordinance, the use of natural gas was unknown.

3. HAS NO POWER TO MAKE ORDINANCE PENAL.

A municipality has no power to make the violation of such an ordinance criminal or to make the ordinance penal in its nature. Such power, if it exists, must be delegated in specific terms.

4. THAT OTHER CITIES DO NOT REQUIRE IT NOT MATERIAL.

The fact that no other city ever required such information of gas companies is not material, where the fact of the power resides in a municipal corporation.

FISHER, J.

These two cases involve the same question, and are disposed of together.

They are in this court on petition in error from the police court of the city of Springfield.

On November 22, 1899, one T. J. Creager, filed with the clerk of the police court of the city of Springfield, two affidavits, as follows:

"In the Police Court of Springfield, Clark county, Ohio.

"State of Ohio, Clark county, City of Springfield, ss.:

"Before me, George Winans, clerk of the police court in and for the city of Springfield, in the county of Clark and state of Ohio, aforesaid, personally appeared Thomas J. Creager, who, being by me first duly sworn according to law, deposeth and saith that on the first day of November, nor on any day prior thereto, in the year of our Lord, one thousand eight hundred and ninety-eight, at the city of Springfield, in said county and state aforesaid, one James W. R. Cline, he, the said James W. R. Cline, being then and there the secretary and manager, and the chief officer of the Springfield Gas Company, a corporation duly incorporated under the laws of the state of Ohio, and being then and there situate in said city of Springfield, in said county and state aforesaid, and being then and there engaged in furnishing natural gas and illuminating gas to the citizens, public buildings and streets of said city of Springfield, in said county and state aforesaid, under and by virtue of certain ordinances of said city, duly passed on the twentieth day of November, A. D. 1898, and on the twenty-first day of January, 1896, which ordinances were then and there during the year next preceding the first

day of September, 1898, in full force and effect, failed and neglected to make and file, and did not make and file, in the office of Philip Hounker, in said city of Springfield, aforesaid, said Philip Hounker being then and there the duly elected, qualified and acting city clerk of said city of Springfield, a report duly verified by his oath for the year next preceding the first day of September, A. D. 1898, and ending on said first day of September, 1898, stating and setting forth in said report:

"First. The aggregate cost of all gas (meaning thereby natural gas and illuminating gas) manufactured or furnished by said company (meaning thereby the Springfield Gas Company, of Springfield, Ohio) during the year (meaning thereby the year next preceding the first day of September, A. D. 1898).

"Second. The number of cubic feet of gas (meaning thereby natural gas and illuminating gas) manufactured or furnished by said company (meaning thereby the Springfield Gas Company in Springfield, Clark county, Ohio,) during the year (meaning thereby the year next preceding the first day of September, A. D. 1898)."

"Third. An itemized statement of all the other expenses (meaning thereby expenses of whatsoever nature or kind) of said company (meaning thereby the Springfield Gas Company in the city of Springfield, Clark county, Ohio) including salaries of its officers (meaning thereby officers and employees of said The Springfield Gas Company in Springfield, Clark county, Ohio).

"Fourth. The total receipts of said company (meaning thereby the Springfield, Gas Company) from said city (meaning thereby the city of Springfield, in Clark county, Ohio) and the citizens (meaning thereby the citizens of Springfield, Clark county, Ohio,) of said city for gas (meaning thereby natural gas and illuminating gas) or any report of whatsoever nature or kind as required by an ordinance of said city of Springfield, entitled an ordinance, "requiring gas companies and gas light and coke companies to make annual reports, then and there in full force and effect, duly passed on the twenty-second day of September, 1885, and contrary to the provisions of said ordinance, and in violation of same; and affiant further says that no report of whatsoever nature or kind as required by said ordinance aforesaid, has been filed by any officer or person in charge of said The Springfield Gas Company in the city clerk's office in said city of Springfield aforesaid, for said year next preceding the first day of September, A. D. 1898, and that said James W. R. Cline aforesaid, is guilty of the fact charged.

T. J. CREAGER.

"Sworn to and subscribed before me by the said Thomas J. Creager in the city of Springfield, at said county aforesaid, on the twenty-second day of November, A. D. 1899.

G. W. WINANS,

"Clerk of the Police Court of the City of Springfield, Ohio."

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Both affidavits are alike except as to date of the offense; one charging an offense in 1898 and the other in 1899.

On these affidavits warrants were issued, and James W. Cline, the plaintiff in error, arrested.

Counsel for Cline interposed demurrs to the sufficiency of the affidavits to constitute an offense.

The grounds of demurrer are:

First. That the affidavit does not state any offense under the laws of the state of Ohio.

Second. The ordinance under which the prosecution is brought is invalid, for the reason that the city council had no authority to enact the same.

These demurrs were overruled by the court, and the plaintiff in error excepted.

The plaintiff in error was thereupon arraigned, pleaded not guilty, was tried and found guilty, and sentenced by the court to pay a fine of twenty-five dollars and costs. A motion for a new trial was overruled. Execution was stayed, a bill of exceptions signed and filed with a transcript of the proceedings before said police court in this court.

The facts necessary for an understanding of the cases as they appear from the bill of exceptions and record are as follows:

The ordinance on which the affidavits were based was enacted by the city of Springfield, September 22, 1885, and is as follows:

"Section 1. Be it ordained by the city council of the city of Springfield, Ohio, That in order to enable said council to determine what would be a fair and reasonable price for the gas to be furnished to the citizens, public grounds and buildings, streets, lanes, alleys and avenues of said city by the companies hereinafter mentioned, the president or other officer in charge of any gas company, or any gas light and coke company, situate in said city, shall, on or before the first day of November, in each year, make and file in the office of the city clerk of said city, a report, verified by the oath of such officer for the year ending on the first day of September preceding, which report shall state:

"1. The aggregate cost of all gas manufactured by said company during the year.

"2. The number of cubic feet of gas manufactured by said company during the year.

"3. An itemized statement of all of the other expenses of said company including salaries of its officers, and not included in the first item.

"4. The total receipts of said company from said city and the citizens of said city for gas, and from all other sources during the year.

"Section 2. The president or other officer in charge of such company, who refuses and neglects to make and file the report at the time prescribed in section 1, shall pay a fine, not exceeding fifty dollars and

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costs, and he shall be subject to a like penalty for every period of thirty days thereafter he so refuses or neglects to make and file the same.

"Section 3. This ordinance shall take effect and be in force from and after the time prescribed by law after its legal publication.

"Passed September 22, 1885."

This ordinance was passed prior to the introduction of natural gas in the city, which occurred June 4, 1889, the grant being made to the Springfield Natural Gas Company; this company sold all its rights to the Springfield Gas Company, January 12, 1893; that the plaintiff in error was and has been the general officer and manager of said last named company for five years prior to the finding of the affidavit, and as such general officer, had knowledge of the ordinance of September 22, 1885.

It further appears that no report was ever filed or attempted to be filed by him or any other officer of said company as required by said ordinance; that no request, at any time or manner, was ever made of the gas company by the city or any of its officers or agents, for such reports; and no proceedings were ever instituted by the city to enforce said ordinance.

The council and board of public affairs of the city of Springfield have, at several different times since the passage of the 1885 ordinance, entered into contracts by ordinance for the furnishing of gas and fixed the price to be charged therefor.

Creager, the person filing the affidavits and instituting the prosecution, is a citizen of the city of Springfield, and a consumer of gas from said company; but in no way connected with the city council or the board of public affairs, and did not hold any official authority under the city.

It is the contention on behalf of the plaintiff in error, that the court below erred in refusing to sustain the demurrer to the affidavits and in holding the plaintiff in error to answer the charge of filing said ordinance.

The counsel for the plaintiff in error supports this contention on two grounds:

First. The ordinance does not apply to a natural gas company. Therefore, the company against which the complaint is made, being a natural gas company, the arrest of its manager was without authority.

Second. The city council had no authority to enact the ordinance.

I. Does the ordinance apply to natural gas companies? Counsel for the plaintiff in error claims that inasmuch as the ordinance was enacted before the utilization of natural gas for heat and lights by cities in central Ohio was thought of, and before the state had delegated to municipalities the authority to regulate and fix the price of natural gas, it must be held that the terms "any gas company," used in the ordinance, mean "any illuminating gas company;" "illuminating" having refer-

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ence to the "manufactured article," as distinguished from nature's product; that the use of natural gas being practically unknown and therefore not in contemplation of the legislative body of the city at the time the ordinance was enacted, no different meaning can be given to the terms used by such body than that clearly manifest when applied to the facts existing at the time, and as shown and fixed by the known circumstances and conditions of the subject intended to be legislated about; and that the term "gas" used in the ordinance must be limited as referring only to that kind of gas then known and used by municipalities for light; and the only gas then in use being manufactured gas, the ordinance must be held to apply only to a company engaged in manufacturing gas for illuminating purposes, and cannot by judicial legislation be held to apply and extend to a natural gas company.

This contention on the part of the plaintiff in error is supported by Findlay Gas Co. v. Findlay, 1 Circ. Dec., 468, decided by Moore, J.; but I am inclined to the opinion that if the city had, in the first instance, the power to enact this ordinance, then that the doctrine of statutory extension applies, and the ordinance would apply to natural gas companies, although unknown when the ordinance was enacted.

The phrase "any gas company," as used in the ordinance, is general, and embraces as well as describes, under the term "gas," any kind or species of gas, whether made by the then only known process or by a new and then unknown process; whether made in nature's laboratory or in one devised by man.

The ordinance is a general regulation looking to the future, and must apply to companies to come into existence as well as those then in existence.

The fact that natural gas, so far as city use was concerned, was a new species of gas, and could not have been in mind when the ordinance was enacted, and that some of the requirements of the ordinance are only applicable to companies selling manufactured gas, there being no words of limitation, does not prevent its extension over a company that has been granted the right by the city, to sell such new species of gas to its citizens subsequent to its passage.

The rule is, as laid down by Endic on Inter. of Stat., sec. 112, p. 147, "That the language of a statute is generally extended to 'new things' which were not known and could not have been contemplated by the legislature when it passed. This is generally, if not always, the rule when the statute deals with a genus, and the 'thing' which afterwards comes into existence, is a "species."

If this ordinance is valid, then when the city granted to the natural gas company the right to occupy its streets and sell its gas to the citizens, such company became a "gas company situate in the city," and whether its product was natural or manufactured gas, the ordinance be-

came a part of its contract, capable of being enforced by proper legal action.

The rule of statutory extension has been repeatedly followed by our Supreme Court, and notably in this class of cases.

Unless the right to grant to natural gas companies the use of the streets arises from the general grant of power to municipal corporations, or is found in the sections of the statutes relating definitely to gas companies, then there is no such power in the municipalities, because there is no general law specifically authorizing cities to grant rights in their streets to "natural gas companies" by name.

That a city has such right, however, is supported by a long line of authority; but it is conceded only by statutory extension.

The act of March 4, 1887, amending secs. 2487 and 2491, Rev. Stat., did not grant this power, sec. 2487, as amended, assumes the prior power in cities to make such grants, and recognizes the lawful establishment and existence of natural gas plants in the streets of cities.

Section 1692, Rev. Stat., wherein the general grant of powers is found, and sec. 3550, relating to gas companies, were enacted long before the existence of natural gas companies was ever thought of; so as to the heat and power act passed March 25, 1880, 77 O. L., 88; yet it has never been deemed essential to amend any of these sections or any of the other sections of the statutes so as to specifically name natural gas companies in order to give to a municipality the power to grant to such company the use of its streets.

If the power to make such grants existed prior to the amendment of sec. 2487, Rev. Stat., then such section as it stood before the amendment was ample to and did confer upon the city the power to regulate the price of natural gas, and the amendment specifically designating natural gas added nothing.

The terms "gas company," as used in the section before amendment, were comprehensive enough to include a natural gas company. *Toledo v. Natural Gas Co.*, 8 Circ. Dec., 273; *Railway Co. v. Telegraph Association*, 48 Ohio St., 890-428.

II. Had the city of Springfield the power to enact this ordinance?

In discussing this question the civil character of the ordinance or statute, capable of being enforced by civil action, must be distinguished from its penal character, enforceable by criminal prosecution.

As a civil statute, requiring gas companies, using the streets of a city under a grant from the city, to place in the hands of the city certain information, essential to enable the city to intelligently and fairly administer the power or trust delegated to it of fixing the price of gas, so as to be just to the citizens and the company, I am of the opinion that the city had the power to enact such ordinance and to compel obedience thereto by a proper civil proceeding; and I am further of the opinion that the gas company when it accepted the grant from the city,

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to use its streets and furnish gas to its citizens, made such ordinance so far as its civil character was concerned, a part of its contract with the city.

It is conceded as a fixed rule, that a municipal corporation can only exercise such powers as are—

First. Necessarily implied as essential to its very existence; or

Second. Expressly delegated to it by the state.

But every expressly delegated power carries with it such implied powers as are essential and necessary to effectively enforce such delegated power.

The state has delegated to municipal corporations the power to regulate, as between their citizens and gas companies, the price of gas. Section 2478, Rev. Stat.

This trust or power must be administered by the municipalities justly and fairly between the gas companies and the citizens, and to do this the municipality must of necessity exercise such powers as are implied from the power delegated and necessary to intelligently fix a price of gas as would be just to the seller and reasonable to the consumer.

It has been repeatedly held that the authority in the city to regulate the price of gas must be exercised with reasonableness and fairness both to the seller and consumer, and if not so exercised, and the price fixed is unjust to the seller, the ordinance fixing the price would be invalid.

In discussing the question of the power to regulate, the court in City Gas Co. v. Des Moines, 72 Fed. 829, says:

"The very use of the term 'regulate' implies that an investigation shall be made; that an opportunity to present the facts shall be furnished; that when the facts are established they shall by the regulating power be given due consideration, and that such action as shall be taken in view of these facts thus ascertained, shall be just and reasonable, and such as enables the company to maintain its existence, to preserve the property invested from destruction, and to receive on the capital actually and *bona fide* invested a remuneration or dividend corresponding in amount to the ruling rate of interest."

"The company has a right to such gross income from the sale of gas as will enable it to pay all legitimate operating expenses, pay interest on valid fixed charges so far as bonds or securities represent an expenditure actually made in good faith, and also to pay a reasonable dividend on the stock so far as this represents an actual investment in the enterprise."

Railway Co. v. Minn., 134 U. S., 418; Reagan v. Loan & Tr. Co., 154 U. S., 362-398.

Toledo v. Gas Company, 3 Circ. Dec., 273. These cases are not in conflict with the cases of State ex rel. v. Ironton Gas Co., 37 Ohio St., 45.

If the municipality in the exercise of the power to regulate the price of gas must exercise it in a reasonable, just and intelligent manner,

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and the rate fixed must be based upon the ability of the company to maintain its existence, then it seems to me it must be conceded that the reports required of the company under the ordinance are absolutely necessary to enable the city to deal justly between its citizens and the company.

If such information is necessary, and the city must regulate, and must regulate in a reasonable manner, then it has the authority to require such facts, alone in the possession of the company to be placed in its hands in order that it may regulate intelligently and justly.

The power to regulate is not a power to confiscate, but implies the power and duty to investigate, and the power to investigate implies the power to obtain the facts, figures and data to make the investigation.

An ordinance requiring a company to make such reports, as are required in this ordinance to be filed from time to time, is not an ordinance seeking to regulate the business of the corporation or in any manner interfering with its business, its sole and only purpose is to require the company to place in the hands of the corporation, by annual reports, such facts as are essential and necessary to enable the city justly to exercise the expressly delegated power of regulating the price of gas.

The fact, if it be a fact, that no other city has ever required such reports cannot be of weight if in fact the power resides in the city.

The duty imposed on the gas company by the ordinance, is a duty solely due to the municipal corporation; it is a civil duty, and then only by the city through its proper officer, and then only when a contractual relation exists between the company and the city.

The municipality has no power to make the violation of such an ordinance criminal, or make the ordinance penal in its nature. Such power, if it exists, must be delegated in specific terms, and I am unable to find that the laws of the state have anywhere delegated any such power to the city.

A city has no power to pass a penal ordinance making the failure of those whose duty it is to comply with the obligations of a civil contract, punishable by fine. *Thornhill v. Cincinnati*, 2 Circ. Dec., 592; *Street Railroad v. Brooklyn*, 37 Hun., 413.

I am therefore of the opinion that so far as the council of the city of Springfield undertook by this ordinance to make the failure of filing the reports required of the gas company criminal, punishable by fine, it exceeded its authority, and that the court below erred in refusing to sustain the demurrer, and discharge the plaintiff in error, and the judgment is therefore reversed, and plaintiff in error discharged.

Oscar T. Martin, for plaintiff in error, J. W. R. Cline.

J. Forest Kitchen, prosecutor police court.

Stafford & Arthur, Bowman & Bowman, for defendant in error, city of Springfield.

Lauer v. Life Assurance Society.

PLEADING.

[Superior Court of Cincinnati, Special Term, 1900.]

LAUER, ADMX., v. EQUITABLE LIFE ASSURANCE SOCIETY.

1. WRITTEN INSTRUMENTS AS EVIDENCE OF INDEBTEDNESS.

A written instrument as evidence of indebtedness, under sec. 5085, Rev. Stat., comprises any instrument in writing which witnesses a promise, whether conditional or unconditional, on the part of the maker thereof, to pay a certain fixed, liquidated sum of money; when sued upon, a copy of such instrument must be attached to the petition.

2. POLICY OF INSURANCE WITHIN THE RULE.

An insurance policy is a written instrument within the meaning of sec. 5085, Rev. Stat., above referred to, and when sued upon, a copy thereof should be attached to the petition; and if a copy of the application for insurance constitutes a part of the policy, it should also be attached; otherwise it is not required.

3. RULE AS TO AVERMENT OF TIME AND PLACE.

The time when the contract was made, if material, must be stated and laid truly; but if not material, any time antecedent to the bringing of the suit, within the statute of limitations, will suffice. The place of making the contract need not, as a general rule, be averred; place, however, may become material in a particular case, and the burden of pleading it, whether upon the plaintiff or defendant, will depend upon the circumstances of such case.

4. COURT CANNOT TAKE JUDICIAL NOTICE OF CONTRACT.

Plaintiff, in his petition, has the right to state his view or conception of the matter or contract, and if defendant does not agree with him, he then interposes his defense to sustain his own view or destroy plaintiff's. But the court cannot undertake, on mere motion, to make plaintiff plead a view of the contract not in harmony with defendant's notions, as the court cannot take judicial notice of what the contract really may be.

5. RULE IN DECLARING UPON CONTRACTS.

In declaring upon a contract the primary rule is that the promise, the obligation, of the defendant, must be fully, truly and accurately set forth; hence, if the promise or obligation be dependent upon conditions precedent, such conditions form an integral part of the promise or obligation of the defendant, and must be fully, truly and accurately pleaded.

6. COMMON LAW RULE AS TO AVERMENTS.

At common law it was the rule that a performance of each condition precedent set forth as a part of the promise must be averred specifically; but these averments of performance related and referred to, and were required of, those conditions alone which plaintiff averred as a part of the defendant's contract.

7. AVERMENTS OF PERFORMANCE OF CONDITIONS.

Section 5091, Rev. Stat., substituted an averment of performance, generally, for the specific averments of the common law, but in no way broadened the effect of such an averment. It is still limited to, and is to be read in connection with the conditions precedent, pleaded by plaintiff as part of the defendant's contract.

DEMPSEY, J.

These are two actions brought to recover the amounts agreed to be paid on two policies of life insurance. In neither case was a copy of the policy sued on attached to the petition. Defendant has interposed a motion to make each petition more definite and certain, and presents five particulars in which it is claimed each petition is wanting. The points is: d are exactly alike in each case:

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1. The first claim is that a copy of the policy sued on, together with the application therefor, should be annexed to the petition.

Section 5085, Rev. Stat., provides that "when the action * * * is founded on an account, or on a written instrument as evidence of indebtedness, a copy thereof *must* be attached to, and filed with the pleading."

Is a policy of life insurance "an evidence of indebtedness" within the meaning of this section?

It is contended that it is not, for the reason that the statute contemplates that the instrument itself, on inspection, and without the aid of any other evidence, *must* show an obligation of the maker to pay. At least that is my understanding of plaintiff's contention. The effect of this rule would be to obviate the necessity of attaching such instruments, when the obligation to pay was dependent upon the performance of precedent conditions.

It is difficult to determine the question by reasoning from the words of the statute itself; and, while the doctrine of *profert*; relied upon by the plaintiff, has some analogy to this code requirement, yet the parallel is not sufficiently complete to warrant a presumption that the codifiers were altogether guided by the rules of *profert* at common law. *Profert*, while extending to some other instruments, was distinctly and peculiarly applicable to deeds, *i. e.*, to deeds technically called such *viz.*, writings, sealed and delivered, and was a requirement demanded not only of the plaintiff, but also from a defendant when he justified or defended by deed. Now, under the code, we have no requirement that a defendant, when relying on an instrument of writing as a defense, shall attach a copy to his pleading; and, even as to the plaintiff, the requirement is made only when the action is founded on such an instrument as evidence of indebtedness. I have not been able, in the resources at my command, to find any explanation of the reasons which produced the code provision. Viewing the code historically and as an evolution or improvement of the common law system, I have reached a theory which I think is reasonable.

The common law action of debt was so called because it was in legal consideration for the recovery of a debt *eo nomine* and *in numero*, and the test of the right to institute this action was that the demand sued for, at the time of suit brought, should be for a sum certain or capable of being reduced to a certainty. It made no difference what the form and nature of the obligation was, whether by parol, in writing or under seal, and whether conditional or unconditional, if at the time the action was brought the obligation was for a sum of money defined and certain, or that by calculation would be reduced to certainty, then debt would lie. As a consequence this action became the favored one for suing on such obligations, and as most of the commercial obligations (save bills and notes), such as charter parties, insur-

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ance policies, bonds conditional for the payment of money and the like, were executed under seal, were in fact technical deeds, profert was necessarily required of them, and of course uniformly made. In course of time the sacredness of the seal and the seal itself disappeared; but the substance of these various obligations continued, and while technical profit was not insisted upon, yet copies of these instruments were required to be furnished to the other side on demand. These later requirements were in reality a practical profert, and were, I take it, the profert referred to in the cases reported in our Tappan and is the same kind of profert referred to by Judge Gholson in Memphis Medical College v. Newton, 12 Dec. Re. (2 H., 168,) 882, as required in Swan's Statutes, page 670.

The code went a step further as to such instruments when sued on as evidences of indebtedness, and required copies to be filed with the pleading. Now, the limitation implied by the words "as evidence of indebtedness" was intended to embrace and confine the class to such instruments as might have been declared on in an action of debt at the common law, and this, we have seen, includes only such instruments, as at the time of suit brought, evidenced a sum certain as due. From this I deduce this definition :

An instrument in writing which witnesses a promise upon the part of the maker thereof to pay a certain, fixed, liquidated sum of money, is as to such maker, an evidence of indebtedness, to that amount, on his part; or, to be more accurate, such an instrument becomes an evidence of indebtedness on his part when his promise to pay matures according to the terms and conditions of his contract. Such an instrument is each policy of insurance herein, and, consequently, a copy of each should be annexed to its appropriate condition.

I know this view of mine is partly speculative, but the results I reach are in harmony with those of Judge Swan, and he was contemporary with the introduction of the code. See Swan's Pleading and Precedents (under the code), pages 200-202, wherein he discusses sec. 117 of the code, now sec. 5085, Rev. Stat., in connection with sec. 122 of the code, now sec. 5086, Rev. Stat., and where he lays down the rule that this section "includes every kind of written contract, conditional and unconditional, for the payment of money, or which creates or is evidence of the indebtedness upon which the pleading is founded." And he gives this illustration, that if an action is brought by a mechanic to recover the amount due him upon a written contract for the building of a house, a copy of the contract must be attached to the petition. And many such building contracts are as intricate and involved as insurance contracts. This question presented itself to me, but I was unable to solve it with satisfaction to myself: Suppose the man having the house built instituted an action against the mechanic for breach of contract, why should not a copy of the contract be attached to this petition? Of course the

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only answer is, the statute does not require it. But why was the distinction made?

Whether the applications are to be annexed with the policies to the petitions will depend upon the facts. When the statute says that a copy of the contract shall be attached, it means a copy of the whole contract. Now, if by the terms of the policies, the applications are made part and parcels thereof, then they must be attached with the policies, otherwise not.

2. The second claim of defendant is that the plaintiff be required to state in each petition, if such be the fact, that the applications for the policies were made parts of the contracts of insurance.

This motion must certainly be overruled. The pleader has his choice of statement; he must set out the material parts of the contract sued on correctly; but he may do this by a recital or copy of the very words of the contract, or by a statement of its substance and legal effect. In the first manner of statement, the court judges of the meaning and effect of the instrument as pleaded; in the second manner of statement, the pleader takes the risk as to the correctness of his interpretation of the contract, and lays himself open, when he comes to his proof, to variance between his contract as alleged and as offered in the evidence. Which ever way he pleads, the court, in the first instance, can not take judicial notice of what the contract really may be; that is an issuable fact, and is to be determined after an issue thereon has been promptly made up. This matter is discussed more at length in division five hereof.

3. The third claim of defendant is that plaintiff ought to be required to state in each petition, "if condition eight on the third page of the policy forms a part of the contract of insurance, the legal effect and substance of said condition and the application therein referred to."

This part of the motion is also overruled. The remarks made in division two hereof are also applicable here. In addition it may be said that this part of the motion presumes that the court judicially knows all about the contract which is the subject of controversy between the parties. The court can not know that in the first instance. That is one of the objects of the pleadings to inform the court as to the subject of controversy. Plaintiff has the right to state his view or conception of the matter, and if the defendant does not agree with him then he interposes his defense to sustain his own view or destroy plaintiff's view. But the court can not undertake on mere motion to make the plaintiff plead a view of the contract in harmony with defendant's notions.

4. The fourth claim is that plaintiff should state when and where the application was executed and delivered to the defendant, and when and where the policy was delivered, and when and where the first premium was paid. Plaintiff is bound to state a time when the contract was made; when time is material it must be laid truly; when not mate-

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rial then any time antecedent to suit brought, within the statute of limitations, will suffice.

Plaintiff has stated a time for the contract as he conceives it to be; the court can not require additional dates to suit defendant's notions of the contract, although he may be right in his interpretations. This is a transitory action, and in such actions place is not generally material and need not be averred. Place may become material, but in these actions, if it does, it is a matter of defense and defendant must plead it. As to the time and place of payment of the first premium, under the contract as pleaded, they do not appear to be material as conditions precedent to defendant's obligation, and no averment as to them is necessary. They are pleaded herein as a part of the consideration, which always must be set forth in declaring on contracts generally.

This part of the motion is denied.

5. The fifth claim is that the plaintiff be compelled to set forth in each petition all the conditions precedent to the taking effect of each policy, or to a right of action thereon, contained in either the application for said policy or the policy itself.

The question presented here involves also the questions raised in the second, third and fourth divisions of the motion, and a somewhat fuller discussion of the principles involved will make it plainer why the claims made in those three particulars of the motion were denied. Each petition herein alleges "that the said Sidney H. Lauer" (who is the assured), "and this plaintiff" (who is S. H. L.'s administratrix), "each duly performed all the conditions of said policy on their part to be performed," and then goes on to allege specifically the performance of two certain acts required by the policies.

The defendant's contention is that by averring the performance of all necessary percedent conditions, the plaintiff, by implication, avers the existence of such conditions, and, therefore, defendant is entitled to have them set forth specifically. At first blush this contention seems plausible, but a consideration of the principles governing pleadings on contracts shows that it is not quite sound.

In the structure of special counts in assumpsit, at common law, and also in debt and covenant, six points were principally to be attended to, viz : The inducement, the consideration of the contract, the contract itself, by which is really meant the promise of the defendant, certain necessary averments, the breach, and the damages. An analysis of the right of action on any contract will show that it resolves itself into the foregoing six elements, and this, of course, obtains under the code as well as at common law ; and a statement of a cause of action, whether it be by declaration at common law or complaint under the code, must, either expressly or impliedly, cover five of these elements, that is, all of them except the heading "necessary averments," which is a term

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used in the books to cover those allegations of fact which are often necessary to be made after a statement of what the contract is, and consequently the obligation imposed thereby, and before the statement of the breach, in order to show that the obligation has arisen.

What we are most concerned in herein, however, is the topic of what are necessary averments, and, coincidentally with that, with the statement of the defendant's contract or promise. For, if we comprehend rightly what was the true relation and connection that existed between those parts of a declaration at common law which, respectively, contained the statement of the contract, and the statement of necessary facts to fix an obligation under the contract, then we will have no difficulty in understanding the code provisions as to the performance of conditions precedent and the nature and extent thereof.

In every system of pleading, I take it, it is essential that the tribunal to try the controversy be made acquainted with the subject of the controversy. At least, that was the rule of the common law, and where, as in the cases at bar, the subject of controversy was a contract, or rights arising under a contract, it was necessary that a statement of what the contract is, or is claimed to be, be set forth in the declaration. That rule remains intact under the code.

Now, in the manner of statement of the contract, two general rules always governed. The first was that the contract should be stated with certainty; *i. e.*, there should be certainty as to the parties by and between whom the contract was made, and there should be certainty as to time, and, formerly, as to place; but, latterly, in what are known as transitory actions, place has not been deemed, in general, material, and, consequently, averments as to place, are not usually in the first instance essential.

The second general rule, in regard to the statement of the contract, is that the plaintiff must state the contract correctly, and, as the main *gravamen* of the action is the defendant's promise, it follows that the nature and quality of the defendant's promise must be accurately stated.

Now, a promise may be absolute, or it may be conditional or qualified, and the conditions may be express or implied; but whatever be the form and nature of the promise, it must be accurately and correctly described in the declaration. Now, if the rule as to correctness of description be followed by the pleader, it would ensue as a necessary consequence that in declaring upon a promise conditional or qualified in its nature, whether by implication or express provision of the contract, the conditional character of defendant's promise, and the conditions themselves upon which the promise depended, must necessarily appear. Hence, before a breach can arise, these conditions must be disposed of, and that is done in that part of the declaration which sets forth the averments of the performance of the conditions to be performed precedent

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to the maturity of defendant's promise, or which sets forth some valid excuse for their non-performance.

Thus, says Chitty, in Vol. 1 of his work on Pleading : "When the obligation of the defendant to perform his contract depended upon any event which would not otherwise appear from the declaration to have occurred, it is obvious that an averment of such an event is essential to a logical statement of the cause of action, and should precede the statement of the defendant's breach." Where the defendant's promise is absolute, the pleader proceeds at once from the statement of the contract to the breach without any intermediate averments. But when performance is to depend upon the prior performance by plaintiff of certain conditions, then at common law, the plaintiff must aver the fulfillment of such conditions, and the averment of performance must be specific as to each condition, express or implied, of the contract, and the performance must be shown to have been according to the intent of the contract and exactly done.

These three latter requirements gave rise to much nicety and subtlety of statement in pleadings at common law, to avoid which was the object of the codifiers in the enactment of sec. 121 of the code, now sec. 5091, Rev. Stat., which permits an averment, generally, of the performance of conditions precedent. Now, if we carefully consider the relation borne, in common law declarations, to the statement of the contract by that part of the declaration devoted to the averments as to the performance of conditions, we will see that the purpose and object of the latter averments, are not, in any degree, to add to or subtract from the terms and conditions of the contract and defendant's promise as they have been previously set forth and described in stating the contract; that is, they do not alter the description of the contract at all, but their office is to show that certain terms and provisions of the contract as described have been carried out, when it is necessary for such terms and conditions to be carried out before defendant's promise will ripen into an obligation.

In other words the conditions, performance of which must be averred, are the very conditions, no more, no less, that the pleader incorporates in his statement or description of the defendant's contract or promise, and the averment of performance is made necessary in order that a liability may be shown to have arisen on that very contract and promise. No uncertainty, as to the existence of conditions precedent, could arise at common law from the averments of the performance thereof, for the very reason that the performance was required to be averred *specifically*; that is, each condition, expressed or implied, in the contract as described or stated, had to be taken up, and a performance thereof, exact and in accordance with the intent of the contract, averred.

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The statement of the defendant's promise, if correctly made, showed the conditional character of the contract, and the nature of the conditions; the subsequent averments as to performance traveled the lines of the contract as alleged, and purported to meet only such conditions as were expressly shown or necessarily inferred from the nature of the contract declared on. Now, the only rule of pleading changed by the code in regard to contracts generally was this rule as to the pleading of performance of conditions precedent. Instead of requiring the showing of an exact, certain and specific performance the code substituted the right to plead performance generally, leaving it to the evidence to determine the sufficiency of the performance.

But the rule as to the statement of the contract, and as to the nature and quality of the defendant's promise, remains as at common law. And, so likewise, of the relation, under the code, to the statement or description of the defendant's promise borne by that part of the petition containing the averments of performance of conditions precedent; that has not been altered in any way. These general averments under the code, when necessary, follow as a sequence to the statement of the contract, and the conditions they refer to are limited to, and must be limited to the conditions which the pleader describes, or which are necessarily inferred as a part of the contract sued on. Hence, if a pleader pleads generally under the code the performance of all required conditions, we must look to the contract, as he describes it, to ascertain what the conditions, if any, are; if there are no conditions in the contract, but the promise is absolute, then the averment as to performance was useless and might be stricken out; if there are conditions described or to be implied, then the averment as to conditions is to be restricted and confined to them. In other words, the averment as to performance of conditions presupposes the previous setting forth of a contract with conditions, to which conditions alone the averment of performance is to be directed. The averment can not be used to raise a presumption that there are conditions to the contract other than those set forth in the petition or to be necessarily implied from the nature of the contract sued on. It is true that as a matter of fact there might be conditions annexed to defendant's promise over and beyond what is set forth or necessarily implied in the petition; if such be the case, then the plaintiff has not pleaded the contract truly and correctly, but the remedy therefor is not by a motion of this kind, which is in the nature of a special demurrer, and goes only to matter of form. The defect is one of substance, and must be met by making an appropriate issue upon it.

In the cases at bar the issue would be one of fact as it is very evident the parties differ as to what the true contract is. The plaintiff has pleaded her version of the contract, and as stated by her she has, on the

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face of her petitions, good causes of action. Defendant must meet plaintiff's case by some appropriate plea.

The motion to require a setting forth of all the conditions precedent, etc., is overruled.

As a result of the foregoing consideration, defendant is entitled to take under the motion an order on plaintiff to attach to her petitions the whole contracts of insurance sued on; the rest of the motion is denied.

In reaching the conclusions arrived at in this decision, I have been governed mainly by the rules and principles of pleading as set forth in 1 Chitty on Common Law Pleading, Bliss on Code Pleading and Swan's Pleading and Precedent.

Simeon M. Johnson, for the motion.

Judge Sayler and H. P. Kaufman, contra.

DEBTORS AND CREDITORS—PREFERENCES.

[Superior Court of Cincinnati—Special Term, 1900.]

SAMUEL H. TAFT V. FOURTH NATIONAL BANK ET AL.

1. RULES AS TO AVOIDING PREFERENCES.

A preference given by an insolvent debtor to a creditor within four months of the filing of a petition in bankruptcy can not be avoided, unless it appears that at the time of receiving the preference the creditor had knowledge of some fact or facts calculated to produce in the mind of an ordinarily intelligent man a belief that the debtor was insolvent.

2. MERE SUSPICION NOT SUFFICIENT.

Constructive notice is sufficient ground for such a belief; but the circumstances upon which notice is predicated must be of a character to induce belief as distinguished from suspicion.

DEMPSEY, J.

The question at issue in this case arises as a consequence of a bill of inter-pleader filed by plaintiff, between the defendants, John Weld Peck (trustee), the Fourth National Bank and C. Crane & Co., and it is sought by said trustee to recover from said bank and said Crane & Co. the amount of a certain indebtedness paid to said Crane & Co. by the H. C. Maxwell Co., bankrupts, for whom Peck is trustee in bankruptcy, on the ground that the same was a preference in violation of the bankrupt act, and made within four months previous to petition filed against the bankrupts. So far as the Fourth National Bank was concerned the claim against it was abandoned by the trustee.

Section 60 of the present bankrupt act is as follows:

"Preferred creditors: (a). A person shall be deemed to have given a preference if, being insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class.

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"Preference when given; voidable. (b). If a bankrupt shall have given a preference within four months before the filing of a petition, or after the filing of a petition and before the adjudication, and the person receiving it or to be benefited thereby, or his agent acting therein, shall have reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person.

"In order that a transfer shall constitute a preference which may be avoided, four elements are necessary: First, the transfer must be made from an insolvent person to a creditor; second, the effect of such transfer must be to enable the creditor to obtain a greater percentage of his debt than any other creditor of the same class; third, the person receiving the transfer, or to be benefited by it, or his agent acting therein, must have had reasonable cause to believe that it was intended thereby to give a preference; fourth, the transfer must have been made within four months before filing a petition in bankruptcy, or after filing the petition and before the adjudication." Loveland on Bankruptcy, sec. 194.

In the case at bar, as the evidence discloses, the first, second and fourth elements above are practically admitted or established. The disposition of the case depends upon the effect of the evidence in the case in establishing the third element.

Under this element, it is necessary to establish that the creditor, at the time of receiving the transfer, must have had reasonable cause to believe that a preference was intended to be given. This element includes within itself two subordinate factors, (1) the creditor must have reasonable cause to believe that the debtor is insolvent; and, (2) also to believe that he is to receive a greater percentage of his debt than other creditors of the same class Loveland on Bankruptcy, sec. 194, p. 468.

To my mind, it is clear that the second subordinate factor must result if it be established that the first (reasonable cause to believe insolvency) existed. And as to this first factor, Loveland lays down the rule (p. 468) that it is not necessary that the creditor know or even actually believe that a preference is being given, provided he has reasonable cause to be put upon inquiry as to whether a preference is actually given or not. Constructive notice is sufficient, upon the ground that when a party is about to perform an act by which he has reason to believe that the rights of a third party may be affected, an inquiry as to the facts is a moral duty, and diligence an act of justice. The decision of Mr. Justice Bradley, in *Grant v. National Bank*, 97 U. S., 81, is then quoted at length, wherein that learned judge distinguishes between "belief" and "suspicion" as to insolvency, concluding with the deduction that reasonable cause to believe a debtor insolvent means that there must be knowledge of some fact or facts calculated to produce such a belief in the mind of the ordinary intelligent man.

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Accepting Justice Bradley's conclusion as the true test, let us see what will be its effect when considered in connection with the evidence in this case. These facts appear to be undisputed from the evidence. The H. C. Maxwell Co. was a hopelessly insolvent concern for at least six months prior to July 11, 1899; on that day the company was adjudged a bankrupt by the United States district court, and subsequently Mr. Peck was elected trustee in bankruptcy. On April 10, 1899, the company had sold, after advertisement by circulars, etc., all of its stock of merchandise on hand, lumber that was unfinished, and lumber that was made up into sashes, doors and blinds, to Samuel H. Taft for \$2,900, which was paid in four notes from Taft, three of them for \$900 each, and one for about \$200, the balance. It should have been stated that this company was operating a planing mill, or window and sash factory. On August 3, 1899, in a suit brought by Johnson *et al.* against the company its plant was levied on, and on May 18, all of its stock of machinery, personal property and office fixtures, were sold by the Sheriff of Hamilton county. On May 26, 1899, proceedings in bankruptcy were begun against the company by the Western German Bank, and on July 11, 1899, the adjudication was made. Sometime after, it does not appear when, Mr. Taft was enjoined by the trustee from paying his notes to other parties than the trustee.

C. Crane & Co. are, and have for many years, been engaged in the lumber trade in Cincinnati. The Maxwell Co. had been doing business with Crane & Co. for a long time. Between the twentieth and twenty-fifth of April, 1899, the company was indebted to Crane & Co. in the sum of \$422.80, on two overdue notes given in settlement of account, one of the notes having matured December 18, 1898, and the other March 18, 1899. During these two dates in April, 1899, Mr. Maxwell called upon the Crane company, with one of the Taft notes to his company, for \$900, due September 11, 1899, and offered to pay his indebtedness to the Crane company, if Mr. Crane would discount the Taft note and pay to him, Mr. Maxwell, the difference in cash.

To this Mr. Crane assented, and the transaction was consummated, Mr. Maxwell receiving the difference in cash between his indebtedness and the discount and the Maxwell company's Taft note, and C. Crane & Co. receiving the said Taft note. On May 25, 1899, Crane & Co. discounted the Taft note with the Fourth National Bank. Mr. Clinton Crane was the only witness offered on both sides to testify as to the discount transaction, and the circumstances connected therewith, and to the knowledge possessed by his firm of the condition of the H. C. Maxwell Co.

Now, in view of the actual condition of the Maxwell company, the two suspicious circumstances connected with the discount transactions are the fact that at that time its notes to Crane & Co. were overdue, one long past due, and the other fact that it might appear somewhat unusual

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for a concern doing some business to seek discount of a large note from a creditor, when it is customary for reputable business men to seek their banks. An additional suspicious circumstance is that he knew, by the circulars sent around, that the Maxwell company was offering to sell its entire stock of lumber. Now, if we look at the other side of the picture, we have Mr. Crane's testimony that it was nothing unusual for lumber men, or people buying lumber, to default in the prompt payment of their notes, and that in his business it was an every-day practice of his to discount paper for his customers, or accept paper from them and credit it on his accounts. As to the lumber sale by the Maxwell company, he says that it was a public auction sale. As to the levy upon the plant, he never knew anything about that until the protest of the note in controversy; in fact that time was the first he ever knew that the Maxwell company was in any trouble in any way, shape or form. Thus he qualifies by fixing the time at the date when Mr. Taft notified him that he had been enjoined from paying the note. He then testifies that the day Maxwell brought the note in, he told him (Crane) that he was going to quit the business, that he had sold, or made arrangements to sell, the machinery to some one, a carriage factory he thought. Mr. Crane says the excuse was reasonable, for all the Cincinnati mill men were complaining at that time; there was no money in the business, because goods could be shipped in here cheaper than the home men could make them. He further testifies that he considered the Maxwell company financially good from February to May, 1899; that he did not know of the Johnson & Co. judgment, nor that they had been sued by Fuller & Rice; and this was about all the evidence offered, no one being called to show other facts or to contradict Mr. Crane.

Now, assuming that the mind of the court is the mind of the ordinary intelligent man, it is my duty to place myself in Mr. Crane's shoes, at the time this transaction took place, and say whether the facts that were known to him then were such facts as were calculated to produce a belief that this company was insolvent. The court can not in a conscientious discharge of its duty say they were. There are two strongly suspicious circumstances that might control if unexplained, but to my mind they have been so explained, by Mr. Crane, by the conduct and custom and practice of his own business.

The solution of the question is purely in the weighing of the evidence introduced, the balancing of the probabilities to be inferred from the circumstances. To my mind the evidence has not taken the case beyond the domain of suspicion, and that, according to Justice Bradley, is not sufficient.

The judgment will be for Crane & Co.

Peck, Shaffer & Peck, for Peck, trustee.

C. W. Baker, for C. Crane & Co.

PLEADING.

[Superior Court of Cincinnati, Special Term, 1900.]

BLOCK ET AL. V. STANDARD DISTILLING AND DISTRIBUTING CO.**1. EXPLANATORY AVERMENTS ARE PROPER.**

While it may not be material in the least to the controversy between the parties, yet for the court to get an intelligent understanding of the subject of the controversy, it is always proper that explanatory averments should be made, by way of inducement, of matters connected with the subject of the controversy that otherwise would be left vague and uncertain.

2. COURT MUST ASSUME THAT CONTRACT IS AS STATED.

The court cannot take judicial notice of what the terms and conditions of the contract really are, save as disclosed by the petition; and in the first instance, when the question is presented by motion to make the petition more definite and certain, being in the nature of a special demurrer, the court must assume that the contract is as stated, without qualification.

3. RULE AS TO AVERMENTS IN SUIT ON CONTRACT.

While a plaintiff must state the contract sued on, at least so much thereof as embraces the defendant's promise, truly and correctly, yet it is sufficient to state those parts of it whereof a breach is complained, or, in other words, to show so much of the terms beneficial to the plaintiff as constitutes the point for the failure of which he sues.

4. WHETHER CORRECTLY STATED REACHED BY ISSUE.

The question whether the plaintiff has stated the contract correctly, or incorporated all that is essential to his right to recover, cannot be met by motion or special demurrer; that is matter of substance, and is reached by tendering proper issue of fact.

5. RULE AS TO AVERMENT OF CONDITIONS PRECEDENT.

So much of the petition as is devoted to averment of performance of conditions precedent is not by way of explication of the contract, which must be independently set forth when the contract itself is stated, expressly or by way of necessary inference, but are averments which are to show that the conditions of the contract, as they are stated or described, when the contract is set forth, have been fully complied with and the obligation of the defendant fixed.

6. SURPLUSAGE—IN SUIT ON CONTRACT.

In a suit on a written contract, an averment that "among other things it was agreed," the words "among other things" should be stricken out as surplusage.

DEMPSEY, J.

Plaintiffs sue on a written contract, and aver that by said contract, "among other things, it was agreed," and then plaintiffs set forth in substance so much of the contract as they rely upon, and from which it appears that plaintiffs were to be appointed "one of the authorized agents or distributors of defendant's product," and then follow other terms of the contract. The general averment is then made that "the plaintiffs have faithfully complied with all the provisions and conditions of said agreement on their part."

A motion is interposed by defendant to make the petition more definite and certain by stating: 1. What were "the other things" which, as mentioned in the petition, were agreed upon in the contract? 2.

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What is meant by the words "authorized agents or distributors of defendant's product?" 3. What were "the provisions and conditions of the agreement" on the plaintiff's part referred to in the petition?

Taking the second branch of the motion first, it is my judgment that this part of the motion should be granted. While it may not be material in the least to the controversy between the parties, yet for the court to get an intelligent understanding of the subject of the controversy it is always proper that explanatory averments should be made, by way of inducement, of matters connected with the subject of controversy that otherwise would be left vague and uncertain.

2. As to the first branch of the motion, in reference to the phrase, "among other things," it is my judgment that those words ought to be stricken out, as surplusage and immaterial.

While a plaintiff must state the contract sued on, at least so much thereof as embraces the defendant's promise, truly and correctly, yet "it is sufficient to state those parts of it whereof a breach is complained, or in other words, to show so much of the terms beneficial to the plaintiff in a contract, as constitutes the point for the failure of which he sues; and * * * it is not necessary or proper to set out other parts not qualifying or varying in any respect the material parts above mentioned." 1 Chitty on pl., *811. Now, the court cannot take judicial notice of what the terms and conditions of the contract really are, save as disclosed by the petition, and in the first instance, when the question is presented by a motion of this kind, which is in the nature of a special demurrer, must assume that the substance of the contract, at least so much of the contract as is beneficial to plaintiff, is as stated by him in his declaration, and that without any qualification or condition. The plaintiff has picked out what he judges he is entitled to recover on, and we must presume for the purpose of the motion that he has judged rightly. The statement of additional matter would be needless prolixity, and add nothing to the cause of action.

While it may turn out that he has not stated the contract correctly—that is, incorporated all that was essential to his right to recover on the particular contract—the question as to that can not be made by motion, or special demurrer. That is matter of substance, and is reached by tendering a proper issue of fact, and, when the proof comes on, the plaintiff would fail by reason of a variance between his contract as stated and the evidence thereof he offers. Nevertheless, as the words complained of tend to raise an uncertainty, they ought to be stricken out.

3. As to the third branch of the motion involving the averment generally of the performance by plaintiff of the conditions and agreements on his part, I wish to refer to my decision in the case of Lauer, administratrix, v. Equitable Life Assurance Co., 10 Dec., 397, decided concurrently with this case, in which I made a careful examination of

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this point, and in which I came to the conclusion that when performance of conditions is pleaded in actions on contract, the averments thereof are intended, however general in their nature, to refer alone to such conditions as are stated in the pleading as a part of the defendant's contract, or necessarily implied from the nature of the particular contract sued on. In other words, that so much of the petition or declaration as is devoted to averment of performance of conditions precedent is not by way of explication of the terms and conditions of the contract, which must be independently set forth in the petition or declaration when the contract itself is stated, either expressly or by way of necessary inference, but are averments which are to show that the conditions of the contract, *as they are stated or described*, when the contract is set forth, have been fully complied with, and thus the obligation of the defendant has been fixed.

That was the rule at common law, where in pleading such performance it was incumbent upon the plaintiff to do it specifically—that is, to take each condition contained in the contract and show by his averments that he had performed them exactly and in accordance with the intent of the contract. Now, such performance could not be averred, unless the conditions had been previously averred, and that must be done when the contract or promise is stated. In other words, these two portions of the declaration or petition go together, the averments as to performance following as a necessary sequence to the statement of the contract, and, consequently, the conditions whose performance is averred must be, and can be, only those which form part of the contract or promise as stated. When a pleader avers generally that he has performed all the conditions on his part to be performed, that, read in connection with the contract as previously stated by him, means that he has performed all of the conditions set forth or required by the contract stated. As a consequence of this construction, no uncertainty as to the existence of other conditions can arise from the general averment permitted by the code, for in its effect it is to be limited to the contract described in the petition.

Of course, as said in the Lauer cases, there may be conditions over and above those set forth in the statement of contract as made by the pleader; but, if that turn out so, then the delinquency is one, not of form, but of substance; the plaintiff simply has not stated the contract truly and correctly; and the defendant meets that by tendering an issue on that fact. If the defendant is right, then plaintiff is sure to run up against a variance.

For these reasons, which are elaborated in the Lauer cases, this branch of the motion will be denied.

William Worthington, for the motion.

Thornton M. Hinkle and *Frederick W. Hinkle*, contra.

ATTACHMENT AND GARNISHMENT.

[Hamilton Common Pleas, March, 1900.]

*** W. E. CALDWELL CO. v. BURTON LUMBER CO.****1. ATTACHMENT AND GARNISHMENT—JUDGMENT.**

In an attachment case under sec 5551, Rev. Stat., where the defendant is served by publication and the garnishee answers that he does not owe, although the existence of a *res* does not affirmatively appear, if such disclosure is unsatisfactory to the plaintiff, the latter is entitled upon default to a judgment for the entire amount due, in order that he may subsequently pursue such garnishee in an action under sec. 5553, Rev. Stat., which actions, though separate in form, are on the doctrine of relation, to be treated as one proceeding.

2. CONDITIONAL APPEARANCE AMOUNTING TO VOLUNTARY APPEARANCE.

The appearance of the defendant for the sole purpose of objecting to the jurisdiction of his person is not a voluntary appearance; but any step, such as an objection to the jurisdiction of the subject-matter, or the authority of the court to enter the judgment (which are not well founded) or an objection to the finding of a *res*, is a waiver of the jurisdiction of the person, whether intended or not, and constitutes a voluntary appearance.

3. COURT MAY PERMIT WITHDRAWAL OF APPEARANCE.

There is a presumption that an attorney in good standing has authority to enter the appearance of his client. The court has, however, a discretionary power to permit an attorney to withdraw an entry of appearance made without authority or under a misapprehension of his authority.

PFLEGER, J.

Plaintiff sued the defendant, a non-resident, in attachment and served a garnishee. No service was had on the defendant except by publication; no real estate or chattels were attached and the garnishee answered that he was not indebted in any sum. The plaintiff demanded judgment by default against the defendant for the full amount claimed in the petition, although no jurisdiction of the person of the defendant was had or a *res* belonging to the defendant appeared, in order that he might pursue the garnishee, because his disclosure was not satisfactory to the plaintiff, as provided under sec. 5551, Rev. Stat.

Section 5553, Rev. Stat., provides that "final judgment shall not be rendered against the garnishee until the action against the defendant in attachment is determined." Local counsel appeared in behalf of defendant who claimed that he did not enter appearance for his client except only for the purpose of questioning the jurisdiction of the court, and insisted that no judgment could be rendered, because it did not appear that the garnishee had any property or money belonging to the defendant.

Counsel for defendant cited *Myers v. Smith*, 29 Ohio St., 120 (1877), which holds that "if the proceeding is purely *in rem* and the jurisdiction depends on property of the defendant subject to garnishment being in the hands of the garnissees, the fact that such property exists must be found before the suit in attachment can proceed to final judgment."

* Note by the Court: This case was reargued on the findings made in the first syllabus, upon the court's own motion, and has not as yet been determined.

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Plaintiff's counsel answered that this was mere *obiter*; that in 1855 the superior court, in general term, in *Valette v. Trust Co.*, 2 Handy, page 1, held that the plaintiff is not postponed in obtaining his judgment in such a case until by the answer of the garnishees or otherwise it should appear that they or some of them are indebted to the defendant; that the affidavit of the plaintiff that there was property or debts to be appropriated to the payment of his claim must be considered as sufficient, and when he has completed a service by publication and the time for answer has expired, and he has offered the proof required, in the absence of any defense, he must be considered as entitled to a judgment for the amount.

This decision, it is claimed, should not supersede the decision in *Myers v. Smith*, *supra*, rendered by the Supreme Court twenty-two years thereafter.

Plaintiff's counsel also cite *Whitman v. Keith*, 18 Ohio St., 134; *Pope v. Insurance Co.*, 24 Ohio St., 480, and *Squair v. Shea*, 26 Ohio St., 645, as indirectly in point in that each indicated from the statements of the cases that judgments for the full amounts claimed by the plaintiffs in attachment were rendered. The last case seems to bear this out. They were all decided on other points and can not aid in the determination here. In *Bark v. Railway Co.* 21 O. S. 221 it was held proper for the court to hear testimony to determine whether there was property.

Counsel on each side claims that the actual practice has been according to his construction. The question has long been a mooted one. An examination of authorities outside of Ohio seems to support the contention of the defendant. These, however, are based upon statutes other than our own. The argument seems reasonable that where there is no jurisdiction of the person nor of the *res*, the authority of the court is ended. A brief reference to them may be made.

The fact of the indebtedness from the garnishee to the defendant should be conclusively shown to authorize the court to act and render a conditional judgment. When the garnishee failed to appear or answer, it was his privilege to be again called into court, and until an indebtedness is disclosed the court can not take jurisdiction to render a judgment to sustain subsequent proceedings against the garnishee, because the same are null and void. *Hagerty v. Ward*, 25 Texas, 145; *Spears v. Chapman*, 43 Mich., 541. Unless the liability of the garnishee is clear and unqualified, as shown by his disclosure, no judgment can be rendered. *Smith v. Holland*, 81 Mich., 471; *Ruehl v. Ruoff*, 113 Mich., 294. The effect of the garnishee's answer, that he is not indebted is to stop further proceedings against the defendant, because the court has nothing upon which it can base jurisdiction to proceed. *Shinn on Attachment*, sec. 642 (e). The action must fail and all proceedings under it are wholly void. *Ib.*, sec. 680. If, however, the garnishee admits an indebtedness to the principal defendant, the court has jurisdiction of the *res* and may,

in effect, render judgment against the defendant to the extent of the value thereof and also against the garnishee for the same. Ib., sec. 681.

In some courts, by the rules of practice, a judgment in form is entered against the defendant for the amount by the plaintiff proven to be due, and a judgment with execution is awarded against the garnishee to turn over the funds in his hands in any amount not exceeding the amount of the debt and costs. Shinn on Attachment, sec. 681. Judgment *nisi* must be for a specific sum *in numero*. Dickerson v. Walker, 1 Ala., 48; 21 Ala., 556; Shinn on Attachment, sec. 683. The publication may be sufficient to enable the plaintiff to obtain judgment which he can enforce by sale of the property, but for any other purpose such judgment would be ineffectual. Cooley's Const. Lim., sec. 404.

A construction of our statute is therefore necessary. That final judgment shall not be rendered against the garnishee until the action against the defendant in the attachment is determined, applies under sec. 5551, Rev. Stat., to a garnishee who fails to appear and answer, as well as to one who appears and answers, and his disclosure is not satisfactory to plaintiff (as for instance, where he denies any indebtedness, or admits less than he is actually owing), and to a garnishee who fails to comply with the order of the court to deliver the property or pay the money into court.

If, under the authorities cited and the decision of Myers v. Smith, *supra*, the jurisdiction of the court depends upon the affirmative finding that some property exists upon which to base the judgment in an attachment case, such finding could not be had if the garnishee either failed to appear and answer or if he denied all indebtedness until the issues were tried in the auxiliary suit against the garnishee, which under the code, in point of time, must be subsequent to the finding and judgment in the attachment case. The actions are separate in form yet they are so closely related and dependant upon each other as to be practically one action and treated as such. And, to illustrate, in the event the garnishee admitted owing but \$5.00, when it could be shown in the action against him that he owed \$500, unless the judgment were for the full amount claimed by the plaintiff, it would be necessary for the plaintiff to split his claims and judgment to \$5.00 and should he proceed against the garnishee on such a judgment, he could not recover more than the the garnishee. Although both actions can proceed at the same time, amount of such judgment even though in the suit against the garnishee \$500 appeared to be due from the plaintiff would not have time to return to the original action in attachment, it still pending, or bring a new one for the difference in time to obtain the benefit of the amount found due in the auxiliary suit; nor could there be but one trial against the garnishee, and this probably would be considered *res adjudicata*. More difficult, however, would be the situation if the garnishee failed to appear and answer, or, as in the case at bar, the garnishee denied any indebtedness,

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which disclosure was not satisfactory to the plaintiff. The right of the creditor to proceed against the garnishee ought not to depend upon the honesty of the garnishee to make a true disclosure.

Under sec. 5551, Rev. Stat., the plaintiff has the right to pursue the garnishee under such circumstances, provided he obtains a judgment in the attachment case. Now, what kind of a judgment could be rendered or could be had that the garnishee had property, or was indebted in any sum? Logically, none but a judgment for the amount of the plaintiff's claim.

It is evident, therefore, that under the peculiar wording of our statute in all actions in attachment and under each of the conditions provided for in sec. 5551, Rev. Stat., a judgment, at least, in form, should be given for the full amount claimed, good only against the garnishee in the auxiliary suit to the extent that the garnishee has property or money, and not beyond the amount found due the plaintiff, together with costs, and not binding on the defendant for the residue unless the defendant appears in the action.

We are guided to this position also by the construction given a similar provision in the code applicable to magistrates, in a case not reported in the state reports, rendered in 1883 by Judge Okey in Leonard v. Lederer, 10 W. L. B., 450. This was an action in attachment in which no service of summons was had nor an appearance by the defendant entered, and a seizure of only \$80 worth of property. The court said: "It was the duty of the justice of the peace in such case to render judgment in favor of the plaintiff for the full amount of his claim, if within the jurisdiction of the justice." This was followed by Judge Phillips in Coal Co. v. Manley, 10 Dec. Re., 394. If there were any doubt about the jurisdiction, so far as a *res* is concerned, the appearance of the defendant as hereinafter shown determines the question.

2. The additional claim is made that defendant by its counsel has voluntarily entered its appearance. It is urged on the other hand that it was distinctly stated that counsel disclaimed any intention of so doing and appeared only for the purpose of objecting to the jurisdiction of the court and not to the merits.

There was in this case no defective, imperfect or voidable service, nor was there a claim that defendant could not be served by publication. Constructive service only was had. Defendant's counsel objected to the entering of any judgment by default on the ground that the disclosure of the garnishee prevented jurisdiction of the *res* to attach. Had it appeared that the defendant was not subject to be summoned by publication, as in Smith v. Hoover; 39 Ohio St., 249, and it had insisted that by reason thereof neither the publication nor the answer of the garnishee gave the court authority to hear and determine the case and that such objection was well founded, a conditional appearance would have been permissible. It is true that in this case the same objection was

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made as in the case at bar, that the garnishee's answer failed to disclose affirmatively that the garnishees were indebted to the defendant. It was further claimed that even if it did affirmatively appear it could give the magistrate no jurisdiction of the defendant firm because a firm could not be served except in the county where it did business. The court sustained this contention and held such was the exclusive mode of service prescribed, and that service could not be had by publication. Had such objection not been well founded it would no doubt have resulted in a voluntary appearance. The mere intention or express condition of counsel that he did not and would not enter such appearance is not decisive, nor would it be available.

The appearance of the defendant for the sole purpose of objecting to the jurisdiction of his person is not a voluntary appearance, but any other step, such as an objection to the jurisdiction of the subject matter which is not well founded, is a waiver of the jurisdiction of the person whether intended or not. *Elliott v. Lawhead*, 43 Ohio St., 171; *Handy v. Insurance Co.*, 37 Ohio St., 366; *Long v. Newhouse*, 57 Ohio St., 348, 370.

It may well be said, however, that the objection was not to the subject matter. Jurisdiction applies not only to the person and subject matter, but also to the *res* (as in attachment cases), and the authority of the court to enter the judgment or order complained of. *Cooper v. Reynolds*, 77 U. S. (10 Wall.), 318. There was no contention regarding the jurisdiction of the person of the defendant, and strictly speaking, none of the subject matter. The objection was to the jurisdiction of the *res* and the right of the court to enter a judgment.

It follows that by his action, made orally and by brief, counsel has entered the appearance of the person of the defendant. There is a presumption that an attorney in good standing has authority to enter the appearance of his client. The court has, however, a discretionary power to permit an attorney to withdraw an entry of appearance made without authority or under a misapprehension of his authority, and this will be exercised in favor of defendant's counsel if shown to the satisfaction of this court.

Wilby & Wald, for plaintiff.

John D. DeWitt, for defendant.

PLEADING.

[Superior Court of Cincinnati, Special Term.]

EAGLE INSURANCE CO. V. BLYMYER ET AL.**PLEADING WANT OF CONSIDERATION TO NOTE.**

The defendant in a suit upon a promissory note who pleads a want of consideration may be required, by motion to make more definite and certain, to set forth the specific facts upon which such defense is based.

DEMPSEY, J.

The petition declares on a promissory note. The answer is that said note was given without any consideration whatever. Motion is made by plaintiff to require the answer to be made more definite and certain by a statement of the specific facts upon which the defense herein is based. The motion was exhaustively argued and briefed and a vast number of authorities on both sides of the question presented.

The result of the authorities is well summarized in the 4 Ency. Pl. and Pr., 947 and 948, where the statement is made that "in some jurisdictions it will be sufficient to allege generally that the contract sued on was without consideration, while in others it is necessary to state the facts showing the want of consideration."

In Ohio, we have had no direct adjudication by the Supreme Court upon the question. At common law the defense of a want of consideration, total or partial, was available to the defendant under the general issue. As a consequence, much uncertainty always arose as to the real nature of the defense and a plaintiff was apt to be taken by surprise by the claims put forward by a defendant to escape liability. This confusion and uncertainty with regard to issues and defenses was among the evils which led to the adoption of the reformed and codified pleading.

The rules of certainty and precision of allegation, prescribed by the code, are these : 1. The precise nature of the charge or defense must be apparent from the allegations of the pleading. 2. When the allegations are so indefinite and uncertain that the precise nature of the charge or defense is not apparent, it is bad in form. Swan's Pleading and Precedents (under the code), 164-165. And the rule is further laid down, at page 171, that every pleading under the code must be so framed as to fulfill the object of the pleading which is to place before the adverse party the nature of the charge with reasonable precision, particularity and certainty, so that he may know what is the real cause of action or defense.

Now, does the plea, generally, of a want of consideration comply with this rule? A promissory note of itself imports a consideration, so that in an action thereon it is not incumbent upon the plaintiff to plead either the existence or nature of the consideration, and, consequent upon

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the proof, the paper itself stands as evidence, *prima facie*, of a consideration, and it lies upon the defense to destroy this presumption arising from the paper. As was said by Lord Abinger, in *Stoughton v. Kilmory*, 2 Cr. M. & R., 72, a case decided under the reformed rules of pleading, known as the Hilary rules, 4 Wm., 4, and in which the plea was "no consideration" generally, "a variety of circumstances might defeat the consideration; they ought, therefore, to be stated in order that the plaintiff may know what he is to meet." The same doctrine was held in *Eaton v. Pratchett*, 1 Cr. M. & R., in which case, at page 807, the lord justice says that the object of the Hilary rules was "to give the plaintiff due notice of the real defense which is to be set up," and that this "would manifestly fail, if such a general plea as the one in question" (no consideration) "could be sustained; because the plaintiff would be left in the same state of uncertainty in which he formerly was before these rules of pleading were introduced."

How much more applicable is the reason of this argument to the code, whose main object was to attain certainty and preciseness of issue? While we have no decision of any of our higher courts which reach squarely the point, yet we have expressions of opinion which in a great measure indicate the trend of the judicial mind.

Thus, in *McLain v. Chrisman*, 2 Dec. Re., 317, decided in 1860 by the Madison county district court, it was held specifically, on a demurrer to a defense of "no consideration," that the demurrer was not well taken; that said answer was "liable to the objection of uncertainty and indefiniteness;" and that had a motion been made under the code to make more definite and certain, it would have been the duty of the court to have sustained it.

Then came the case of *Chamberlain v. Railroad Co.*, 15 Ohio St., 225, decided in 1865, in which the court, by way of *dictum*, at page 250, say: "But in this case the defendant has set up as his second defense, in general terms, that the note was wholly without consideration and void. This the plaintiff might have required to be made more definite by a statement of the facts upon which the defense was based; but he waived this right and joined issue."

The *dictum* in *Chamberlain v. Railroad Co.*, *supra*, was assumed to be good law as late as 1878 by Judge Hamilton, of the Cuyahoga county common pleas, in *Derby v. Corlett*, 4 Dec. Re., 283, although that case did not call for an application of the rule. And so, also, the circuit court of Licking County, in *Clark v. Clark*, 8 Circ. Dec., 752, decided in 1898, quote approvingly the language of *Chamberlain v. Railroad Co.*, *supra*, although that did not call for an application directly of the rule. This *dictum* is also quoted approvingly in *Corrigan v. Rockefeller*, 8 Dec., 14, reported in 1898 and decided by Judge Neff, of Cleveland, although this case itself was not on a note.

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These various decisions are rather convincing evidence of what the courts of Ohio think upon this question, and as their conclusions are in harmony with the objects of the code, and in promotion of the ends to be accomplished, I am constrained to adopt these views, whatever my opinion might have been had the question been *res integra*.

The motion of plaintiff will be granted.

Judge Sayler and *W. C. Pierce*, for plaintiff.

C. B. Wilby and *C. E. Tenney*, for defendants.

HABEAS CORPUS.

[Licking Probate Court, September 24, 1900.]

EX PARTE, REV. JAMES J. MULLANEY, HABEAS CORPUS.

1. IMPRISONMENT—REQUIREMENTS OF SENTENCE.

Where imprisonment, as part of a sentence upon conviction of assault, is imposed "until the fine and costs are paid," it is the duty of the court to add "or secured to be paid or he be otherwise legally discharged." Without these words the judgment would be equivalent to a life sentence and would be illegal. Sec. 7327, Rev. Stat.

2. INABILITY TO PAY FINE—PRISONER ENTITLED TO DISCHARGE.

Where, upon conviction of assault, the judgment of the court is that accused "pay a fine of \$5.00 to the state of Ohio and the costs of this proceeding," and it is made to appear that accused has no means to pay the fine, he is entitled to be discharged at once. The public prosecutor, nor any other official, has no authority to supplement such judgment by an order of imprisonment.

3. AUDITOR SHOULD DISCHARGE INDIGENT PRISONER.

And it is the duty of the auditor, in a proceeding under sec. 1028, Rev. Stat., when it is made to appear that a person imprisoned until a fine and costs are paid is unable to pay, to at once discharge such person; and he is not excused from such duty by a finding "that the petitioner had friends or relations who are able and should be willing to help him in the emergency."

4. PRISONER ENTITLED TO WRIT OF HABEAS CORPUS.

Upon such a finding the person so imprisoned is entitled, under art. 1, sec. 8 of the constitution of Ohio, to the writ of *habeas corpus*.

5. PROBATE COURT HAS JURISDICTION.

The probate court, in such cases, has jurisdiction to entertain application for and to issue the writ of *habeas corpus*.

6. SUCCESSIVE WRITS MAY ISSUE.

The judgment upon one application for a writ of *habeas corpus*, refusing to discharge the prisoner, is not a bar to another or successive applications based upon the same facts.

TAYLOR, J.

The relator, Rev. James J. Mullaney, at the April term, 1900, of the court of common pleas, of this county, having waived a jury, submitted his case to the court and was tried by the court and found guilty technically of committing an assault. He came before the court for his sentence, and it was considered by the court that, "He pay a fine of \$5.00 to the state of Ohio, and the costs of this proceeding." Such is the judgment

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and sentence of the court and no further order is made in the case. The fine of \$5.00 assessed against him and the costs of prosecution all remain unpaid. Upon the judgment an execution has been issued, to make the fine and costs of prosecution to be levied on the property, or in default, upon the body of the relator, Rev. James J. Mullaney.

Section 6828, Rev. Stat., provides: "Whoever unlawfully assaults or threatens another * * * shall be fined not more than \$200, or imprisoned not more than six months or both."

This is the section under which Mullaney was tried, found guilty and sentenced to pay a fine of \$5.00. The court did not order or direct him to be imprisoned. Had the court ordered that he should remain confined until the fine and costs were paid, it would be equivalent to a life sentence, and illegal: And the court has no such authority or power. If imprisonment is imposed as a part of sentence, it is the duty of the court to add, "That he remain confined in the county jail until the fine and costs are paid, or secured to be paid, or he be otherwise legally discharged." In case the court leave out these words, "or secured to be paid, or he be otherwise legally discharged," the sentence would be illegal. These words "or secured to be paid or otherwise legally discharged," are not in the record or made a part of the judgment. The defendant does not have to pay the fine and costs. He may secure them to be paid at some future time to be agreed upon.

Section 7327, Rev. Stat., provides, "When a fine is the whole or part of a sentence, the court or magistrate may order that the person sentenced shall remain confined in the county jail until the fine and costs are paid, or secured to be paid, or the offender is otherwise legally discharged." This section was wholly ignored by the action of the auditor, and under this execution he would be doomed to a life sentence with no hope for relief, unless the remedy applied for, that of *habeas corpus*, is granted. Even though he had been sentenced to "remain confined in the jail until the fine and costs are paid or secured to be paid, or he is otherwise legally discharged," he was even then entitled to the relief asked for and the auditor should have discharged him, for he had clearly established he was unable to pay or secure payment. The auditor having refused to discharge, he very properly applied for a *habeas corpus*.

Section 1846, Rev. Stat., also provides, "When a fine is the whole or part of a sentence, the court, mayor or president of the board of trustees, may order that the person sentenced shall remain confined in the county jail, workhouse or prison, until the fine and costs be paid, or secured to be paid, or the offender be otherwise legally discharged." The court did not inflict any imprisonment or order that he should be committed until the fine and costs be paid. The court, having made imprisonment no part of its sentence, can any one else do what the court did not do? We think not, and evidently the court did not intend to imprison him for a mere technical assault. No one can add to the sentence

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pronounced by the court. He was still in the custody of the sheriff, imprisoned in the jail of this county, until this writ was issued for his release, a minister indigent, without means; a family, wife and three children, with no prospect of aid, and no means of any kind whatever to discharge this fine and costs assessed by the court against him, or of securing it to be paid. This being the case he was entitled to be discharged and at once.

Sections 7328 and 7329, Rev. Stat., do not then apply to this case, as there was nothing in the sentence of the court to authorize the issuance of an execution to be levied upon the body of the defendant. The judgment, decree, finding or sentence, which ever you may see fit to call it technically, does not provide for imprisonment. It was, therefore, the duty of the commissioner of insolvents to have promptly acted in this case, when applied to, as the evidence established in the hearing of this case that he was not to be imprisoned. For sec. 6861, Rev. Stat., provides, "Any person who may be imprisoned under any process for any fine, penalty, or costs, in any criminal proceeding, shall be entitled to the benefit of this section, at any time, * * * unless the judgment in the case requires imprisonment till the fine, penalty, or costs be paid, or be secured to be paid."

As the judgment in this case against the relator did not require imprisonment there is no excuse for the commissioner refusing to act. It was his duty to have acted and the court would have passed on his proceedings as to their regularity. The commissioner would thereby have been relieved from all responsibility. Under sec. 1028, which reads as follows:

"The auditor may discharge from imprisonment, any person who is confined in the county jail for the non-payment of any fine or amerce-ment due the county, except fines for contempt of court or some officers of the law, when it is made clearly to appear to him that such fine or amerce-ment cannot be collected by such imprisonment."

On August 21, 1900, or immediately before that date, this petitioner made application to the auditor of this county, seeking discharge from imprisonment under the provisions of sec. 1028, Rev. Stat. Upon that application, such representations were made by him as that the auditor found that it is clear that the fine and costs imposed by the court cannot be collected from him personally, and that a refusal to discharge until this penalty is paid in no wise will render collection from the petitioner probable or possible.

Conceding this, the auditor refused to discharge him with the remark "that the petitioner had friends or relations who are able and should be willing to help him in this emergency." This action of the auditor is equivalent to a suspension of the law of the land. If this is the construction to be placed upon sec. 4028, Rev. Stat., then the auditor is and would be an autocrat or an imperialist with unlimited power.

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But this is not the correct construction to be given this section. Inasmuch as the auditor has given sec. 4028 such construction, the relator still has a remedy which no human power can interfere with. For article 1, sec. 8, of the constitution of Ohio, provides, "The privilege of the writ of *habeas corpus* shall not be suspended, unless in cases of rebellion or invasion, the public safety require it." And the same article, sec. 9, provides, "All persons shall be bailable by sufficient sureties, except for capital offenses where the proof is evident or the presumption great. Excessive bail shall not be required; nor excessive fines imposed; nor cruel and unusual punishments inflicted."

To keep this relator, Mullaney, in jail because he could not pay a fine and costs would be "Cruel and unusual punishment inflicted." In the exercise of this power by a single judge, or a court, every case of unlawful imprisonment may be reached and examined into. No matter where or how the chains of captivity were forged, the power of the judiciary, in this state, is adequate to crumble them to the dust, if an individual is deprived of his liberty contrary to the law of the land.

Article 1, sec. 16, further provides: "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law; and justice administered without denial or delay."

To keep this man in jail because he is poor and because his friends or congregation might be driven to pay because of their sympathy is, and would be, "cruel and unusual punishment inflicted." It would be an attempt to extort the fine and costs by a denial of justice and a delay to force the collection. Such action is in conflict with the constitution of Ohio. It is in direct opposition to art. 1, secs. 1, 8, 9, 16 and 18; sec. 18, art. 1 provides: "No power of suspending laws shall ever be exercised, except by the general assembly."

There can be no question, but the action of the auditor is in conflict with this section. No difference how the law reads any portion of the law conferring discretionary power upon a non-judicial officer is utterly void. It certainly was not the purpose or intention of the legislature to confer any such authority upon the auditor, if so, the legislature itself, does not have or possess any right or authority to confer such power. Under the constitution of 1802, art. 8, sec. 9, the phraseology of the language used is but slightly different from the constitution of 1852. Section 9 reads: "That no power of suspending laws shall be exercised unless by the legislature."

It was decided in *In the matter of James Collier*, 6 Ohio St., 55, that:

"The privilege of the writ of *habeas corpus* is secured to every citizen by the national and state constitutions, and can only be suspended or withheld, in case of rebellion or invasion, when the public safety may require it."

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2. The state courts and judges have jurisdiction to hear and determine all questions of imprisonment, without regard to the power which imposes it, or the process by which the captive is held. Any law providing for perpetual and continuous imprisonment would be in conflict with justice, equity and humanity, as well as the federal and state constitutions.

Justice to the taxpayers and people demand that imprisonment should cease at some definite time. How long the auditor wills this to continue, or by what measurement of time its period is to be computed, he does not say. It is, however, certain, that whatever remedy the petitioner may have hope for, under sec. 1028, is for the present time, at least, exhausted. And though relator is not estopped from again appealing to the officer when the auditor may feel less like Brutus and more like the Divine Master, he institutes this proceeding in *habeas corpus* that inquiry be made as to the cause of his restraint and detention. When it is made clearly to appear to him that a fine or amercement cannot be collected by imprisonment, the auditor of the county may discharge from imprisonment any person who is confined in the jail, for non-payment for such fine or amercement. It is not the province of the auditor to discharge one prisoner on an affidavit exactly like the one presented by the relator and then rear back upon his discretionary dignity and deny it to another. That will not do. It would at least put him in the position to be charged with partiality, wrong and injustice. This I would not believe of the auditor, for I know him to be a painstaking, conscientious, honest and efficient officer. We hold it is the duty of the auditor to act and it is specially enjoined upon him, resulting from his position and office, upon the existence of certain facts to discharge the applicant. The very object and purpose of this provision is to give immediate and prompt relief; because the highest rights of the citizen are involved. When the auditor sees that longer restraint is futile, he should set at liberty the person so imprisoned. Otherwise it will be cruel and oppressive. When the auditor refused to act, the only remedy is the writ of *habeas corpus*, which was issued.

In this case no motion for a new trial was made. Prosecution of error cannot be restored to in this case. He filed his affidavit and application for the purpose of convincing the only authority whose attention he could call to the subject, the county auditor, that further compliance upon his part is not necessary to establish the fact that it is not within his power to perform the further penalty inflicted. In an instance like this, error can afford no remedy and the law does not drive a man to do an idle thing. So here is a citizen in jail for life, or at the will of a fellow citizen who fills a public office, for this sentence—as the California courts would call it, is "A coin sentence"—he is there until he pays. If this position can be maintained, then imperialism and arbitrary power can be established in this country. The imprisonment which he

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is now undergoing is no longer penalty. It is punishment for a crime or technically committing an assault, it is the means used to compel him to acquit himself of the balance of the sentence, viz: To pay the fine and the costs which the auditor says he cannot do and has no prospect of being able to do. The law making power never intended a man to be placed in a situation like this, and the law does not accord to a citizen a right without the means of securing it to him. The statute says, that when it comes to pronouncing judgment, the court shall pronounce the judgment provided by law. When the court seeks to enforce a penalty by commitment, the conditions of release are here laid down, and the defendant has the right, not to any one of these conditions alone, but to all of them. There was no order that he be committed to the jail or that he stand committed until fine and costs were paid. The omission to so pronounce was equivalent to saying the court did not intend any imprisonment. The law provides for imprisonment, but the court must make it a part of the judgment of the court and it cannot be supplied by the prosecuting attorney directing an execution to issue for the body of the defendant, for he had no such right or authority in law unless it was made a part of the judgment of the court, and there was no such judgment or record of the kind.

The auditor says he will not discharge defendant because some of his friends are able to help him, and may at some indefinite period do so. His friends might, if they saw fit, secure the payment of this fine and costs, but they are not bound to do so. The import and meaning of a judgment is determined by the light which the record affords. You must look to the record for its terms. A sentence in a criminal case must be so complete that the offender, while suffering the penalty of the law, may still have preserved to him any contemplated rights or conditions. It must be so complete as to need no construction of a court to ascertain its import. It must be so complete that the prisoner may not have to look between the lines for its meaning, and it cannot be supplemented or supplied by a non-judicial or ministerial office. In other words, a man who is compelled to have a lawsuit to get into jail, ought not, by reason of uncertainty of his sentence, be compelled to have another lawsuit to get out.

It may or might be the fine was not adequate to the gravity of his offense; but the court who heard the testimony, and who knew the facts, has placed that point beyond controversy; but whatever be a man's merits, or demerits, his punishment must be always legal, and when not so, a crime, however unintentional, is being committed in the name of the law against every citizen, because if one man can be thus imprisoned, so can another, and no one can say whose turn will come next.

I also quote the syllabus in Picket v. State, 22 Ohio St., 405: "The terms of a sentence of imprisonment ought to be so definite and certain, as to advise the prisoner and the officer charged with the execution of

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the sentence of the time of its commencement and termination, without being required to inspect the records of any other court or the record of any other case."

There arose and it was argued that this court did not have jurisdiction in this matter, as it had been judicially determined. To be a judicial settlement, the question decided must arise in a judicial proceeding properly before a court of competent jurisdiction. The auditor possesses no such power. When it was established these costs could not be collected from this relator then the auditor should have acted and granted the relief asked. The division of the power of the state into legislative, executive and judicial and the confiding of these powers to distinct departments is fundamental. It is essential to the harmonious working of this system that neither of these departments should encroach on the powers of the other. If the judiciary were to assume to decide hypothetical questions of law not involved in a judicial proceeding in a case before it, even though the decision "Would be of great value to the general assembly" in the discharge of its duties, it would, nevertheless, be an unwarranted interference with the functions of the legislative department that would be unauthorized and dangerous in its tendency. Not only this, but it would be an attempt to settle questions of law involving the rights of persons without parties before it, or a cause to be decided in due course of law, thus violating that provision of the bill of rights which declares that every person shall have a remedy for an injury done him by due course of law. Art. 1, sec. 16, Const.

Now it was said and was argued by counsel that this relator had no relief except to pay and that this was equivalent to a second application to a court for discharge from this imprisonment, while the facts were the same. We have given this and other questions raised and involved careful consideration and have examined a great many authorities bearing upon it, and we find that by a great weight of authorities, both in England and throughout the states of this country, it has been determined that the decision of one court or officer upon a writ of *habeas corpus*, refusing to discharge a prisoner, is not a bar to the issuing, by another court or judge of another writ, based upon the same facts. Among other cases in which this is held, we cite King v. McLean, 64 Fed. Rep., 381, and many other authorities is here referred to.

I read from the case of In re Snell, 31 Minn., 110: Upon the general question involved in this proposition there is some difference among courts and text writers. But research and reflection have brought us to the conclusion that the sound rule and that suggested by a great weight of long standing authority, is that the decision upon *habeas corpus* of one court or officer refusing to discharge a prisoner upon the same state of facts as at first to another court or officer, and to a hearing or a discharge thereupon, does not bar another, or the issuing of a second writ by another court or officer. People v. Brady, 56 N. Y., 182.

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A decision under the writ of *habeas corpus*, refusing the discharge of a prisoner, is no bar to the issuing of any number of other successive writs by any court having jurisdiction. *Ex parte Kaine*, 18 Blatch, 1-5.

In some courts there appears to be a disposition to make the right to a second writ a question of expediency for the court to determine. This occurs to us to be a dangerous notion. The "Writ of Liberty" is a writ of right. When we consider its origin, its history and its purposes, the transcendent necessity of its issuance, dependent upon the right of the petitioner and not upon the discretion of anybody, is incontestable.

It may be argued that to allow successive writs will be intolerable and oppressive to the courts and to the public law officers. To this there are several answers: First, business of this kind is ordinarily controlled and conducted by an honorable profession. Second, experience is to the contrary. We may rest with comfortable assurance upon the fact that, after many years trial in this country and centuries of trial in England, the right to successive writs has not been found to work any serious practical inconvenience. Third, if the inconveniences were great, the citizen's right to liberty is greater.

What I have read answers the objections, made in the course of argument before us, to the rule that repeated applications may be made to different courts or judges.

We think therefore upon careful consideration of these authorities, that what has been set forth in the answers as *res judicata* does not amount to a good plea in bar, and does not stand in the way of our proceeding to act upon this application; neither does it afford us just ground for refusing to act.

We come, therefore, to the consideration of the question whether this imprisonment to enforce the collection of these costs under this form of judgment is lawful. Unquestionably clear authority to imprison to force the collection of a debt of any description must be found in the law; otherwise such imprisonment will be unlawful. All the property of this defendant was exempt from this execution. This was well known by everybody. Then there could be no purpose in taking his body except to disgrace him or drive his friends to relieve him. This is unquestionably wrong.

It is equally clear that if the court in this case was authorized to enter judgment that this defendant should be imprisoned and did not, then, no other person can so decide for the court. In the absence of such judgment, an execution such as was issued in this case was wrong.

Now we cannot think these provisions which seem plainly to limit the right to the use of such writ, known as a *capias ad satisfaciendum*, are accidental. We have no doubt but that it is competent for the legislature to provide that a person may be arrested on execution and imprisoned as a part of the process for collecting costs only. I mean in cases where fines are not imposed as a part of the penalty—but it seems clear

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to us that the legislature has not done so, but that it has given the right only where a fine is imposed as a part of the penalty and even then the order or judgment of the court must provide, for imprisonment as part of its finding and made part of the record.

We think the effect of these provisions is that where a fine is imposed by the court, the imposition of such fine results in making the costs also a part of the sentence; and the awarding of this writ for the collection of such costs, amounts to an order or direction of the court saying that such writ shall not issue. It is certainly an easy and convenient method by which the court may determine when the writ shall and when it shall not issue; and that is a matter left, we think very properly, within the discretion of the court, to be exercised according to the circumstances of the case it may have to deal with; so also the court may, in its discretion, adjudge that a party may be confined until the fine and costs are paid, and in such case no writ other than a mittimus setting forth the judgment, need issue. The court did not issue a mittimus. The court did not order an execution to issue. It is provided that a judgement against the defendant for costs shall follow in all cases upon a conviction; but such judgment, unless made a part of the sentence, in the manner above pointed out, we think has no higher dignity or greater force than an ordinary judgment for money in a civil action.

If then there are any laches or lack of authority in the statutes to help out or aid in confining this minister in jail, we do not think it would authorize us to put a strained construction upon this statute as against the right to personal liberty. As before stated, the right to imprison in a given case should be clear and explicit; otherwise it should be held to not exist.

We think, however, that authority for the issuing of an ordinary *fieri facias* upon a judgment which is in effect a civil judgment, as we hold this judgment for costs to be, may be found in some sections of the statutes. Even the entertaining of serious doubts upon this question is sufficient to require the court, under the rules governing the construction of penal statutes, and those to be applied in favor of personal liberty, to take the view that imprisonment is not authorized, and upon the whole we conclude that this is a correct construction of these various statutes.

To deny this writ, would be to enforce this incomplete order or unauthorized execution; to return this minister to jail, would be to inflict upon him imprisonment and disgrace simply because he is poor and unable to pay, which is conceded, can avail nothing in collecting these costs; to remand him to the custody of the sheriff, would be to start him in search of a remedy which he would never find, while to discharge him from custody, does not set aside the penalty, nor forgive the debt which will still confront him and will continue so to do, until paid. The relator is discharged, and the costs of these proceedings is adjudged against the state.

Superior Court of Cincinnati.

DEBTORS AND CREDITORS.

[Superior Court of Cincinnati, April 28, 1900.]

* BARBOUR V. BOYCE ET AL.

1. DEBTS WITHOUT SPECIAL PROVISION, PAYABLE AT ANY PLACE.

A debt, without special provision in regard to payment, is payable at any place; and, hence, may be attached at the domicile of the debtor, although the creditor's domicile may be elsewhere.

2. ILLEGAL CONTRACTS—CREDITOR'S RIGHTS AS TO CONSIDERATION.

While a contract in contravention of good morals, or of public policy, is absolutely void, *inter partes*, so as to prevent the recovery back of any consideration paid thereunder, *quaere*, whether the vice of the contract extends so far as to taint the right of a *bona fide* creditor to subject such consideration to the payment of his debt.

On motion for a rehearing.

DEMPSEY, J.

This is a garnishment proceeding, based upon the non-residence of the defendant, Boyce, and in which the garnishee, Campbell, sought a discharge of the attachment and garnishment which was denied. He has filed a motion for a rehearing which is based upon two grounds:

(1.) Want of jurisdiction of the court over the *res* or property said to be garnished herein; and (2) the illegality or invalidity of the claim that Boyce may have, if he has any, against Mr. Campbell.

The service in the case was constructive purely.

The facts in the case as found by me on the first hearing have not been altered since, and are substantially these: Mr. Boyce was, ostensibly at least, very anxious to secure the votes of certain members of the Ohio general assembly for Mr. Hanna for United States senator, and was willing to pay for them. Mr. Campbell, who on his part was desirous of entrapping Mr. Boyce in his scheme of bribery, entered into negotiations with him whereby, in consideration of a large sum of money to be paid when the desired votes were procured, Mr. Campbell promised to procure certain votes. As an earnest of good faith on his part, Boyce paid to Campbell \$1,750.00; the money was paid at Cincinnati, Ohio; the votes promised by Mr. Campbell were not secured; Boyce, becoming suspicious of a trap, decamped for parts unknown. Mr. Campbell carried the \$1,750.00 to his New York office for safe keeping. Barbour is a creditor of Boyce on a promissory note, and brought this suit; Mr. Campbell was served, and answered, as garnishee, and it appears that he is and was a citizen and elector of Cincinnati at the time of the suit, and at the time of his examination in garnishment. No personal service was ever had upon Boyce.

The conclusion of fact that I came to was, that Mr. Campbell had in his possession \$1,750.00, which *prima facie* belonged to Boyce, and waived

* For previous decisions in this case, see 8 Dec., 548; 9 Dec., 332.

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ing for the moment the contention that any liability therefor under the circumstances was at an end because of illegality in the transaction, that Mr. Campbell's liability was a debt or in the nature of a debt.

Now, as the four factors in our case, we have a creditor of Boyce, a debtor to Boyce, the domicile of Boyce's debtor fixed at Cincinnati, and service only constructively on Boyce.

The contention is made that the court did not acquire jurisdiction over the *res*, which is the debt, for the reason that it never acquired personal jurisdiction over Boyce; and reliance for this contention is had upon R. A. Kelley Co. v. Garvin Machine Co., 4 Dec., 874. The facts of that case I held before were not parallel with this case, it being in reality a decision which determined the *situs* of a debt existing between two foreign corporations. The Fay-Eagan company was a corporation under the laws of West Virginia, having its principal office at Cincinnati, Ohio, and a branch office at Chicago; the Garvin Machine company was a New York corporation, having no agent or place of business in the state of Ohio. These two companies had dealings in Chicago whereby a debt became due from the Fay-Fagan company to the Garvin company, which debt was payable at Chicago, and was the only debt between said companies then, or since, existing. The R. A. Kelley company sued the Garvin company, on a claim existing between them, the suit being in this court, and garnished the Fay-Eagan company. On this state of facts the court held that the domicile of the creditor is the *situs* of the debt, and that a debt which arose and is payable outside of a state, and is due from one non-resident corporation to another non-resident corporation, is not subject to process of attachment and garnishment issued by the courts of such state of which they are non-residents.

The facts of the case limit the decision to non-resident corporations; and that this is true is borne out by the quotation from Judge Taft's opinion in Reimers v. Seatco Mfg. Co., 70 Fed., 573, given at length in Judge Hunt's decision, and from which I extract the following observation:

" We conceive it to be well settled by authority that while, generally speaking, the *situs* of a debt is constructively with the creditor to whom it belongs, it is within the competence of the sovereign of the residence of the debtor, by reason of its control over its own residents, to pass laws subjecting the debt to seizure within its territorial sovereignty. We also conceive it to be well settled that even if the debtor is not a resident of the sovereignty under which garnishment is attempted, such sovereignty still may subject the debt to its process and constructive seizure if the debtor is personally within the service of its process and the debt is payable within its territory * * *. But we are of opinion that a non-resident creditor cannot have his property in the debt seized in a state to which the debtor may resort, not for purposes of residence, but merely for the purpose of doing business through

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agents, when the claim arose on a contract not to be performed within the state, and the debtor does not reside therein."

Since both of these opinions the Supreme Court of the United States has had the question before it, and has taken even broader ground than Judge Taft. In Chicago, R. I. & P. Ry. Co. v. Sturm, 174 U. S., 710, decided May 22, 1899, the highest court in the land lays down the doctrine that a debt may be attached at the domicile of the debtor, though the creditor's domicile is in another state; and that a debt having no special provision in regard to payment is payable at any place. In the case it appears that the defendant in the action, the jurisdictional validity of which was in question, was a non-resident of Iowa, service was had upon him by publication, and the railroad company garnished. The defendant, subsequently, in Kansas, the state of his residence, sought to recover the same money from the company, and the court held that the Iowa proceedings were a bar to the Kansas action. The various phases of the question are discussed at length by Mr. Justice McKenna and the only proposition left undisposed of, is the one where the debt is, by the contract of the parties, made payable at a particular place.

As to the other propositions the court, at page 716, says: "The proposition that the *situs* of a debt is where it is to be paid is indefinite. 'All debts are payable everywhere, unless there be some special limitation or provision in respect to the payment; the rule being that debts, as such, have no *locus* or *situs*, but accompany the creditor everywhere, and authorize a demand upon the debtor everywhere.' 2 Parson's Cont., 8th Edition, 702. The debt involved in the pending case had no 'special limitation or provision in respect to payment.' It was payable generally, and could have been sued on in Iowa, and therefore was attachable in Iowa. This is the principle and effect of the best considered cases—the inevitable effect from the nature of transitory actions and the purpose of foreign attachment laws, if we would enforce that purpose."

In my judgment, this decision effectually disposes of the first contention made in the case at bar.

As to the contention that the illegality of the transaction between defendant and garnishee can be set up in the garnishment, suit by the garnishee to defeat the garnishment, that passes the question of jurisdiction which may be raised by the garnishee and enters into the merits of the contract between himself and the defendant. It may well be that, in jurisdictions where the garnishee is a party in reality to the case, and can, and, in many states, must, make defense for his debtor, it is permissible to him to enter upon a litigation of his liability at all to his alleged debtor. But in jurisdictions, like Ohio, where no findings or orders made upon the garnishee are at all conclusive upon him, but he may relitigate them in the action against himself, it seems to me more than doubtful whether he has any right to inject, or demand a decision upon, a question of this kind. As to the question

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itself, while it may be true that contracts involving the seduction of public officers will not receive the aid of the courts either in their enforcement or in the recovery of damages for their breach, yet the rule has been enforced in its severity mostly against the immediate parties thereto alone.

That an exception would not, and should not, be made in favor of the creditors of either one of the parties to the offending contract, is a question that deserves the closest consideration, and should not be disposed of in the *ex parte* manner usual in attachment proceedings as auxiliary to a principal suit. Many acts that, as between the parties thereto, will neither be enforced nor relieved against, as against creditors will take on a different aspect, and call for some action from the courts. A man, perfectly honest in his intentions, makes a gift to his wife; it turns out afterwards that, unknowingly, he did not retain enough to pay his creditors; they will have relief both at law and equity, by attachment or creditor's bill, to subject the property given to the wife to pay their debts. A lobbyist pays money to a party to procure the vote of a certain legislator; the payee fails to secure the vote; the payee, however, appropriates to himself the money paid; the lobbyist has honest creditors. Why should they not be permitted to sequester this money for the payment of their debts? If an equivalent had passed, a *quid pro quo*, the question might be different.

But in an executory contract, illegal it is true and non-enforceable between the parties, whereby a valuable consideration has passed to one of the parties, who defaults in his part of the contract, and still retains the consideration, it seems to me there is some right or equity in the creditors of the other party whereby they may have this consideration applied to their claims. The very retention of the consideration, it seems to me, as in the case of the man and wife, would be in law a fraud upon the creditors of the other for which they are entitled to a remedy. But the solution of this question can be better worked out in the litigation between the plaintiff herein and the garnishee when that arises, if it ever should. It is my opinion that, *prima facie* at least, the plaintiff herein has made out a right to subject the \$1,750.00 in Mr. Campbell's hands to the payment of his note. Of course, it is not intended herein to adjudicate finally upon the merits of Mr. Campbell's defense to plaintiff's claims, nor upon the merits of the counterclaims he interposes to the same, nor upon the merits of the plaintiff's claims against Mr. Campbell arising through Boyce; all these are necessarily relegated to the suit against the garnishee.

The order heretofore made herein will be confirmed, and the motion of the garnishee denied.

J. J. Glidden, for the motion.

A. A. Ferris, contra.

Superior Court of Cincinnati.

INJUNCTION — SPECIFIC PERFORMANCE.

[Superior Court of Cincinnati, Special Term.]

GUS HILL v. M. C. ANDERSON.*INJUNCTION TO INDIRECTLY COMPEL SPECIFIC PERFORMANCE DENIED.**

Under a contract between the owner and manager of a theatrical company and the proprietor of a theatre, whereby the former agreed to play at the theatre for the week beginning on a certain date and the latter agreed to furnish the theatre, well lighted, etc., without negative covenants on the part of either, the owner and manager of the theatrical company, upon refusal of the proprietor of the theatre to comply with his agreement, is not entitled to an injunction restraining the proprietor of the theatre from permitting any other performance to be given during the week in question. Such an injunction would be for the purpose of indirectly compelling specific performance and, as the element of mutuality of remedy is lacking, the contract cannot be specifically enforced and the injunction should not be granted.

SMITH, J.

The plaintiff states that he is the owner of a first-class show, entitled "McFadden's Flats," and has in his employ a competent company, possessed of the proper wardrobe, music, scenery and advertisements; that said show is a traveling combination, giving exhibitions upon what is known as sharing terms, the plaintiff furnishing all the company and proper wardrobe, music, scenery, and advertisements, and the proprietor of the theatre furnishing the theatre, well cleaned, lighted and heated, together with stage hands, janitors, ticket sellers, etc., the gross receipts being divided equally between the plaintiff and the proprietor of the theatre.

That the defendant is the proprietor of the "Walnut Street Theatre," in Cincinnati, and that on February 16, 1898, he entered into a contract with the plaintiff, upon the terms above referred to, by which it was agreed that the plaintiff was "to play his attraction" of "McFadden's Flats" at the Walnut Street Theatre for the week commencing November 14, 1898; but that, notwithstanding such contract, the defendant has refused to carry out his terms of the contract.

Wherefore, plaintiff prays that said defendant, M. C. Anderson, be enjoined from advertising or permitting the appearance or performance of any other attraction at said Walnut Street Theatre during said week, commencing November 14, 1898.

The defendant admits the execution of the contract and admits that he refuses to comply with its terms, and that he has made a similar contract with the Primrose and Dockstader Minstrels, and has sold many hundreds of tickets for the performance to be given by said minstrels.

The defendant, as an excuse for his action, contends that by the terms of the contract he had the right to rescind the contract whenever

* For decision on motion to strike out in this case, see 8 Dec., 480.

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he chose to do so, and that the entertainment furnished by the plaintiff is of an inferior kind, not suitable to his theatre.

In my opinion the defendant has failed to establish either of these defenses, and I am therefore brought to the consideration of the questions: First, whether the petition states facts which entitle the plaintiff to the equitable interference of the court by injunction; second, if so, whether the plaintiff has so long delayed his application for such relief that he is guilty of laches.

The case was heard and argued before me yesterday, and the interests of both parties require that it should be promptly decided.

The proposition upon which the plaintiff bases his claim for an injunction is, that where a person enters into a contract to do a thing which necessarily implies an obligation to refrain from doing some other thing, that a court of equity will enjoin such person from the doing of the other thing, provided that an action at law will not furnish adequate damages for the breach of the contract; the policy of the court of equity in issuing the writ of injunction being to prevent the one intending to commit a breach of the contract from profiting by such breach, and thus indirectly to force him to an observance of the contract. The leading case in support of this proposition is that of *Lumley v. Wagner*, 1 De Gex, M. & G., 604, in which the defendant was Madame Wagner, a celebrated singer, who had contracted to sing for a certain period at the theatre of plaintiff, and not to sing during such period of time at any other theatre. The court restrained her from the threatened breach of the negative covenant, upon the ground that the element of personal and artistic skill rendered the damages at law uncertain and conjectural.

The English courts, however, have had great difficulty in bringing the principle of this case into harmony with the general principles upon which courts of equity act in cases of contracts, and in *Westwood Chemical Co. v. Hardman*, Law Reports, 2 Ch. (1891), 416, Lord Justice Lindley said:

"I agree with what the late master of the rolls, Sir G. Jessel, said about there being no very definite line; I agree also at what Lord Justice Fry has said more than once, that cases of this kind are not to be extended. I confess I look upon *Lumley v. Wagner* rather as an anomaly to be followed in cases like it, but an anomaly which it would be very dangerous to extend. I made that observation for this reason, that I think the court, looking at the matter broadly, will generally do much more harm by attempting to decree specific performance in cases of personal service than by leaving them alone; and whether it is attempted to enforce these contracts directly by a decree of specific performance or indirectly by an injunction appears to me to be immaterial."

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And in *Davis v. Foreman*, Law Reports, 8 Ch. (1894), 654, Justice Kekewith declared that "the court has declined to extend the principle of *Lumley v. Wagner*."

The difficulty of extending the principle of *Lumley v. Wagner* to contracts generally is stated by that master of the law of chancery, Sir George Jessel, in *Fothergill v. Rowland*, Law Reports, 17 Equity Cases, 132, in which an effort was made to enjoin the defendants, who had contracted to deliver coal from their colliery to the plaintiffs, from delivering coal to anyone else, Sir George Jessel said :

"Then it is said, assuming this contract to be one which the court can not specifically perform, it is yet a case in which the court will restrain the defendants from breaking the contract. But I have always felt, when at the bar, a very considerable difficulty in understanding the court on the one hand professing to refuse specific performance because it is difficult to enforce it, and yet on the other hand attempting to do the same thing by a round-about method. If it is right to prevent the defendant, Rowland, from selling coal at all—he not having stipulated not to sell coal, but having stipulated to sell all the coal he can raise to somebody who has promised valuable consideration—why is it not right to compel him to raise it and deliver it? It is difficult to follow the distinction, but I can not find any distinct line laid down or any distinct limit which I could seize upon and define as being the line dividing the two classes of cases—that is, the class of cases in which the court, feeling that it has not the power to compel specific performance, grants an injunction to restrain the breach by the contracting party of one or more of the stipulations of the contract, and the class of cases in which it refuses to interfere. I have asked (and I am sure I should have obtained from one or more of the learned counsels engaged in the case every assistance) for a definition. I have not only been able to obtain the answer, but I have obtained that which altogether commands my assent, namely, that there is no such distinct line to be found in the authorities. I am referred to vague and general propositions; that the rule is that the court is to find out what it considers convenient or what will be a case of sufficient importance to authorize the interference of the court at all, or something of that kind."

It is true that in *Donnell v. Bennett*, Law Reports, 22 Ch., 835, a case decided subsequently to *Fothergill v. Rowland*, in which the defendant had agreed to furnish complainant all the fish not used by him, and not to sell to any one else, Mr. Justice Fry issued an injunction. In this case the contract contained a negative stipulation not to sell to any one else; and in basing the decision upon this negative stipulation, the court said :

"I have come to the conclusion, therefore, upon the authorities which are binding upon me, that I ought to grant this injunction. I do so with considerable difficulty, because I find it hard to draw any sub-

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stantial or tangible distinction between a contract containing an express negative stipulation and a contract containing an affirmative stipulation which implies a negative. I find it exceedingly difficult to draw any rational distinction between the case of *Fothergill v. Rowland* and the case now before me. But, at the same time, the courts have laid down that, so far as the decisions have already gone in favor of granting injunctions, the injunction is to go."

From this unsatisfactory state of the English authorities on this question one turns to the American authorities, only to find them hopelessly in conflict and irreconcilable. I have not had time to examine all of them, nor time to collate them for the purpose of presenting the different doctrines they declare. It is sufficient for the purposes of this case to inquire and determine, in this chaotic condition of the authorities, what principle the Supreme Court of Ohio has declared will govern it in the decision of this class of cases, and then to follow it, as is the duty of a lower court.

In *Steinau v. Gas Co.*, 48 Ohio St., 324, 380, the contract between Steinau and the Gas Company was that—

"In consideration of the continued use of not less than three-fourths of the present average consumption of gas by Steinau the company stipulated that it would furnish him, for ten years, all the gas necessary for the lighting of his place of business at a price much lower than the then regular price, to be paid monthly. Steinau stipulated to receive the gas in quantity not less than three-fourths of the then average monthly consumption for the time named, and further stipulated not to introduce or use electric lights or material for general illuminating purposes other than gas to be furnished by the company.

"No past consideration appears. The obligations of each party are wholly in covenant and wholly executory."

The prayer was for an injunction to restrain Steinau from using the electric light, or any material for general illuminating purposes other than the gas to be furnished by the company.

The circuit court sustained an injunction against Steinau, but the Supreme Court reversed the judgment. In the course of its opinion, it said :

"Injunction is frequently resorted to as a means of obtaining specific performance. In this case the purpose intended is to prevent the use of electric lights in order that Steinau shall thus be compelled to comply with his contract and use the company's gas. The object thus sought is specific performance.

"Against the demand of the company it is insisted that a court of equity will not grant an injunction to restrain a breach of negative covenants where the result will be to effect specific performance of affirmative covenants unless the affirmative stipulations of the complaining party can be specifically enforced against him.

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"As already stated, the object of the proceeding is, and the result reached, if it is successful, will be to specifically enforce the contract as against Steinau. It seems plain that if the situation of the parties were reversed and specific performance were sought against the company, the court would have no power to compel a full compliance by the company with its stipulations to furnish all the gas needed for the period provided for in the contract. * How can the court order the company to continue the manufacture of gas for the purpose of supplying this consumer? How can it prevent this company from dissolving and going out of business, or from selling out to another which would not be bound by its personal contracts? The inquiry, then, is, if the contract could not be specifically enforced against the company, may it be specifically enforced in its favor?"

The authorities on the point are numerous, and to some extent conflicting. Mr. Pomeroy, in his work on contracts, section 163, observes:

"The peculiarly distinctive feature of the equitable doctrine is that the remedial right to specific performance must be mutual. If, therefore, from the nature of the contract itself, from the relations of the parties, from the personal incapacity of one of them, or from any other cause, the agreement devolves no obligation at all upon one of the parties, or if it can not be specifically enforced against him, then and for that reason he is not in general entitled to the remedy of a specific performance against his adversary party, although otherwise there may be no obstacle arising either from the terms of the contract or from his personal status and relations to an enforcement of the relief against the latter individually."

Again in sec. 165, he says that:

"It is a familiar doctrine that if the right to the specific performance of a contract exists at all, it must be mutual; the remedy must be alike attainable by both parties to the agreement."

While recognizing that there are authorities opposed to this position of Pomeroy, the Supreme Court sums up its conclusion by the statement that:

"However, after a somewhat careful examination of the numerous cases cited by counsel, and many others, we are inclined to the conclusion that the general doctrine laid down by Mr. Pomeroy is sustained by the apparent weight of authority. Hills v. Croll, 2 Phillips, 60; Fothergill v. Rowland, L. R., 17 Eq., 132; Bailey v. Collins, 59 N. H., 459; Pingle v. Conner, 66 Mich., 187; Publishing Co. v. Tel. Co., 83 Ala., 498; Palace Car Co. v. Railway Co., 4 Wood's C. C. R., 317; Meason v. Kaine, 63 Pa. St., 385; Tyson v. Watts, 1 Md. Chy., 18; Richmond v. Ry. Co., 33 Iowa, 422."

Whether the Supreme Court intends to apply this same principle in a case where the complainant has fully executed all terms of the contract obligatory upon him is a question that was not presented by

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Steinau v. Gas Co., supra, and therefore may be said to be still unsettled in this state.

Immediately following the citations from Pomeroy, which the Supreme Court adopts as declaring the principle which should govern it in granting injunctions to enforce specific performance, the court say:

"To this general rule the courts have made an exception where peculiar skill and labor are involved, and this, apparently, upon the ground that the element of personal and artistic skill renders the chances of damages at law uncertain and conjectural. Of this class the case of Lumley v. Wagner, 1 De Gex, M. & G., 604, is, perhaps, the leading case."

It, as contended in this case, the actor has the right to enjoin the proprietor of the theatre from allowing his theatre to be used during the period covered by the contract, just as the proprietor of the theatre has the right to enjoin the actor from acting in any other theatre during such period, then it would be difficult to understand the statement of our Supreme Court that the class of cases illustrated by Lumley v. Wagner is an exception to the rule that the remedy by injunction will only be granted when such remedy is mutual; because in such case the parties would have a mutual remedy. The true construction of this language seems to me to be a recognition by the court of the principle that the actor has no remedy by injunction such as the proprietor of the theatre has, and therefore this class of cases is an exception to the general rule.

In Iron Age Publishing Co. v. Western Union Telegraph Co., 88 Ala., 498, in which the Supreme Court of Alabama declared that the mere right of the defendant to such an injunction as is granted in the class of cases illustrated by Lumley v. Wagner did not entitle the plaintiff to an injunction against the defendant. In that case the court said:

"Mr. Pomeroy says, and such we think is the general rule, that it is a familiar doctrine that if the right to the specific performance of a contract exists at all, it must be mutual; the remedy must be alike attainable by both parties to the agreement. * * * How, it may be asked, is it practicable for the court to compel the complainant to perform personal services as agent and correspondent of the associated press at Birmingham, which it has contracted to perform from year to year under this agreement? We have seen that the duty involves the exercise of special skill, judgment and discretion, being intellectual as well as mechanical in its character. These duties are also continuous in their nature, and of indefinite duration. There can be, as we have shown, no specific performance affirmatively of such duties by a court of equity. The most that can be done is to negatively enforce them by injunction, prohibiting their breach, and this only on bill filed praying such particular relief."

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But we are not without direct authority in a case almost identical to the one at bar. In *Welte v. Jacobs*, 171 Ill., 626, Welte was the manager of a company which was engaged in playing "The Black Crook."

He entered into a contract with Jacobs, proprietor of the Alhambra theatre in Chicago, to play his company for the week beginning December 29, 1895, Jacobs contracting to furnish the theatre, well-cleaned, lighted and heated, together with stage carpenters, ushers, ticket sellers, orchestra, etc., and Welte was to furnish a first-class company. Jacobs refused to perform his part of the contract, and Welte filed a bill in equity, in which he sought to enjoin Jacobs from letting the theatre to any one else, and in this way indirectly to compel him to perform his contract, because it was conceded that the court could not specifically or otherwise enforce the part of the contract which required Jacobs to furnish the usual and necessary light, heat, music, stage hands, etc.

In refusing the injunction sought the court held that there was a want of mutuality of remedy, and that therefore it could not grant the relief prayed. The court said: "Strictly speaking, the bill was not one for specific performance, but for injunction only. It is clear from the allegations of the bill and from the authorities bearing upon the question, that specific performance of the contract could not be decreed. It is not and can not be contended that Welte could have been compelled by any writ the court could have issued, to occupy the theatre with his company of actors and give the performance contracted for, any more than a public singer or speaker can be compelled specifically to perform his contract to sing or speak. Negative covenants not to sing or perform elsewhere at a certain time than a designated place have been enforced by the injunctive process, but further than this such contracts have not been specifically enforced by the courts by injunction or otherwise. *Lumley v. Wagner*, 1 De G., M. & G., 604; *Daly v. Smith*, 38 N. Y. Sup., 158. In *Lumley v. Wagner* there was an express covenant not to sing elsewhere than at the complainant's theatre, and the injunction was placed on that ground.

"But it is urged that negative covenants may be implied as well as expressed, and when necessarily implied from the terms of the contract they will be enforced in like manner (citing cases). While there was a negative covenant in the contract under consideration against Welte it is not important to consider whether or not Welte might have been enjoined from performing elsewhere than at Jacobs' theatre at the time in question, for it is manifest he could not have been compelled to perform at said theatre. Before a contract will be specifically enforced there must be mutuality in the contract, so that it may be enforced by either, and as this contract was of such a nature that it could not have been specifically enforced by Jacobs, it should not be so enforced by Welte. *Lancaster v. Roberts*, 144, Ill., 218; *Fry on Specific Perform-*

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ance, secs. 440, 441; Waterman on Specific Performance, sec. 196; Cooper v. Pena, 21 Cal., 411."

The court subsequently refers to the rule laid down by Pomeroy on Contracts.

The present case is not as strong a case in favor of the plaintiff as was the case of Welte v. Jacobs, because in this case the contract contains no negative covenant.

The decision in Welte v. Jacobs is the logical result of the principle declared by our Supreme Court in Steinau v. Gas Co., *supra*, and is therefore controlling in the case at bar.

I am aware that the conclusion I have reached in this case is in direct conflict with the conclusion reached by a former judge of this court in a similar case, viz., Lacy v. Heuck, 9 Dec. Re., 847. I entertain the highest respect for the learned judge who delivered the opinion in that case and give the greatest consideration to any conclusion he may have reached in a case. At the time the decision in Lacy v. Heuck was rendered, however, neither the case of Welte v. Jacobs nor that of Steinau v. Gas Co., had been decided, and the court, therefore, did not have the benefit of the reasoning of those authorities, nor was it obliged, as I now feel myself obliged, to follow the principle declared in Steinau v. Gas Co.

For the reasons above given the petition of plaintiff is dismissed and the relief prayed for denied. Under the circumstances, however, I think the costs should be equally divided.

Rankin D. Jones, for plaintiff.

Thomas F. Shay, for defendant.

HUSBAND AND WIFE—PROMISSORY NOTES.

[Superior Court of Cincinnati, Special Term.]

FAYETTE SMITH V. LILLIAN BLAUVELT SMITH, ETC.

1. SUFFICIENT CONSIDERATION FOR WIFE'S PROMISE.

A note executed by husband and wife, the proceeds of which were largely used in perfecting the wife's musical education and whereby she was subsequently enabled to earn large sums of money, is good against the wife.

2. APPLICATION OF PAYMENTS ON NOTE.

Where advancements are made, part of which are covered by a note, and payments are made on account, these payments should first be applied to the interest upon the entire indebtedness, and the balance over should be credited on the note.

SMITH, J.

This is an action by Fayette Smith against Lillian Blauvelt Smith on a promissory note dated at Spa, Belgium, July 1, 1890, payable three years after date to Fayette Smith, for the sum of \$2,687.50, with interest, and signed by Royal S. Smith and Lillian Blauvelt Smith.

Superior Court of Cincinnati.

The answer sets up two defenses:

First. That the note is without consideration on her part and is void.

Second. That if the note is good, the defendant is entitled to have credited upon the note certain payments which have not been credited.

I will briefly consider the defenses in the order named.

Royal S. Smith is the son of plaintiff, and Lillian Blauvelt Smith, at the time the note sued on was made and for several years previous thereto, had been the wife of Royal S. Smith. Both Royal Smith and his wife were singers, and in June, 1889, were living in New York, attending the conservatory of music of which one J. Bouhy was superintendent. He was a distinguished teacher and singer from Paris. He formed a high opinion of Lillian Blauvelt Smith's voice and upon his return to Paris urged her to come there and study, and assured her that in course of time he would secure her a good engagement abroad.

Neither Royal Smith nor his wife had any money, and application was made to their father-in-law, the plaintiff, for money to enable them to go abroad. They thought that an advancement of about twelve hundred dollars would be all that was necessary. The plaintiff agreed to furnish the money, and they went abroad and Lillian continued there her studies under Bouhy. By July 21, 1890, the amount advanced had grown to \$2,687.50, and at the suggestion of plaintiff that a note should be given him for the amount, he wrote out the note sued upon and sent it to Spa, Belgium, where the makers of the note were, and they attached their signatures to it and returned it to him.

The Smiths continued with Bouhy until the summer of 1891. In the fall of 1891 Lillian secured an engagement to sing in the Royal Opera in Brussels and made a success, but her health failed, and upon the advice of her physician she returned to America.

She soon after made a great success in America, and became one of the best concert singers on the American stage and received large compensation.

The plaintiff continued to furnish money to them until September, 1892, the total amount furnished, including that covered by the note being \$5,366.09.

In the beginning of 1892, and from time to time during the year, the plaintiff received sundry payments, amounting to \$225. Sometimes the payment was made by the check of the son and sometimes by the check of Lillian, who kept a separate bank account in which she deposited her earnings.

In May, 1893, she made a payment to plaintiff in Cincinnati of \$100 in currency. In 1893, the total amount paid by both was \$450. In 1894 they paid \$450. In 1895 they paid \$250, and in 1896 they paid \$250. In that year Lillian left her husband, and in 1897 she obtained a Dakota

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divorce from him. Before she left him her receipts were said to aggregate from \$8,000 to \$10,000 a year.

In the face of the facts thus briefly enumerated, it is idle for the defendant to assert that the note is void as to her for want of consideration, for it is beyond dispute that the amount advanced by plaintiff was advanced to both Royal Smith and Lillian Blauvelt Smith; that the greater part of it was expended for her benefit; that she was enabled by such expenditure to make a great singer of herself and to annually earn far more than the amount of the note, and that she recognized her liability for the indebtedness by alternately making payments for the same. The first defense has failed.

As to the second defense that the payments made on the indebtedness of Royal Smith and Lillian Blauvelt Smith to the plaintiff reduced the principal of the note.

The payments made by both were clearly intended to be a payment on the entire amount owing, and must first be applied to the interest on the total indebtedness, and if at any time there was a surplus after paying the interest such surplus would be applied to the reduction of the principal, of which the indebtedness represented by the note would be the first item. The note bore six per cent. interest from its date, July 1, 1890, up to October, 1891, when Royal Smith and his wife returned from Europe, at which time it was agreed the indebtedness should bear five per cent. The interest from that time, not only on the amount covered by the note, but also on amounts furnished subsequent to the giving of the note was five per cent.

Applying these principles in the calculation, the amount due on the note may easily be determined, and when determined judgment will be entered on the same against Lillian Blauvelt Smith with five per cent. interest to October 1, 1900.

Charles H. Stephens, for plaintiff.

Edward Colston, for defendant.

MUNICIPAL CORPORATIONS—COUNCIL—ORDINANCES.

[Franklin County Common Pleas, 1900.]

ROBERT S. SMITH, ETC., v. COLUMBUS, L. & S. RAILWAY Co.

1. PUBLICATION ONE DAY EACH WEEK SUFFICIENT.

Publication, when a daily paper is selected, once each week and on the same day, for three consecutive weeks, constitutes a compliance with sec. 2502, Rev. Stat., relating to public notice of ordinances granting rights to street railway companies. It is not necessary that the notice should appear on every secular day for three weeks.

2. VOTING ON ORDINANCE WITHOUT REQUISITE READINGS A NULLITY.

A vote on the passage of an ordinance of a general or permanent nature without having such ordinance read on three different days, or such reading properly dispensed with, is a vain and useless act, and, whether favorable or unfavorable to the ordinance, is a nullity.

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8. COUNCIL OF COLUMBUS A CONTINUOUS BODY.

Under the governmental act for the city of Columbus, an ordinance which had been read on two separate days before the regular election for councilmen, may, after the annual organization of the council following said election, be read a third time and passed. The unfinished business of the old council does not die with the expiration of the terms of the old members, although, under the law in question, the terms of all members, save where by operation of law a successor is not elected and qualified, expire at the same time and an entirely new membership is elected.

WILLIAMS, J.

This is an action brought by the plaintiff on behalf of the city of Columbus, to enjoin the defendant from constructing and from operating and maintaining a street railway upon certain streets in the city of Columbus under and by virtue of the provisions of a certain ordinance, upon the ground that said ordinance is illegal and void.

Four reasons are assigned for the invalidity of said ordinance, to-wit :

First—That public notice of the application for the grant expressed in said ordinance was not given in a daily paper published in said city of Columbus, for a period of three consecutive weeks.

Second—That the ordinance under which the defendant was attempting to proceed when restrained was, March 9, 1900, introduced at a meeting of a regularly elected council and duly read the first time, and the second time, and referred to the committee of said council on judiciary and railroads and viaducts, and that the same was, at a regular and second session of said council, on April 9, 1900, reported back by said committee not approved. That said committee was relieved from the further consideration of said ordinance, and said ordinance was put upon its passage ; that the yeas and nays were taken upon the passage of the same, seven votes being in the affirmative and eleven votes in the negative, and said ordinance was lost and so declared ; that a motion to reconsider was made and lost, and that on said April 9, 1900, said council adjourned and never again convened ; that at a regular municipal election held April 2, 1900, an entirely new council, consisting of nineteen members, was elected ; that less than half of the members of said council so elected on said April 2, 1900, had been members of said former council ; that on April 16, 1900, said nineteen members-elect convened, presented their certificates, qualified and proceeded to organize as prescribed by statute, and that thereby an entirely new council of said city was constituted ; that the life of said former council and the term of all of the members of said former council ended prior to said organization of said new council ; that at the regular meeting of said new council on April 23, 1900, said council, by a vote of a majority of its members, caused the aforesaid ordinance as introduced and defeated in said former council, to be read ; that said reading was the first and only time said ordinance was read before said council ; that the rule requiring said ordinance to be read on three different days was not dispensed with, but

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that said reading of said ordinance was wrongfully and falsely styled the third reading ; that thereupon it was moved, and the motion prevailed, that certain amendments recommended by the board of public works to said ordinance be read, and the same were read, a copy of which amendments is set out in the petition. That thereupon a vote was taken upon the adoption of all of said amendments collectively, and a majority of the members of said council voted in the affirmative. That the said amendments were, upon one call of the yeas and nays, declared adopted ; that thereupon one further amendment was offered and declared adopted ; that said amendments had not, nor any of them, ever before been introduced or read either before said council or before the former council, or any council of the city of Columbus ; that said ordinance as amended was not introduced or read before said council, nor before any former council of said city at any time ; that immediately after said amendments were declared adopted, a motion was made and carried that said ordinance as amended be placed upon its passage, and that the yeas and nays were taken upon the passage thereof as amended, and there being twelve votes in the affirmative and six in the negative, said ordinance was declared passed ; that a motion to reconsider said vote was made and lost ; that thereafter on said April 23, 1900, said council adjourned ; and that said proceedings of said city council, at said meeting of April 23, touching said ordinance, were illegal, null and void, and that said ordinance as amended, was not legally passed at that meeting, and that the same has never been passed.

Third—That the defendant failed to produce to the city council the written consents of the owners of more than one-half of the feet front of the lots and lands abutting on the public ways along which it is proposed, under the authority of said ordinance, to construct said railway. And,

Fourth—That said ordinance was prepared by the defendant and purports to and was intended to provide a single track loop encircling the central part of the city of Columbus for the circulation of interurban cars and traffic ; that said provision is illusory and abortive by reason of the fact that the route specified for said loop is interrupted for a distance of two hundred feet ; that said space constitutes a break in said loop in which there is no authority to construct said railway ; that the failure of said ordinance to provide such loop as it purports and was intended to do, vitiates and annuls the contract on the part of the city which said ordinance represents.

A temporary restraining order was allowed in this case pending application for a temporary injunction, and by agreement of counsel the application was submitted, and it was agreed that it should be considered upon the pleadings, affidavits and exhibits thereto attached ; that in event of the petition being considered sufficient upon its face to warrant the granting of a temporary injunction, that a motion of the de-

fendant to dissolve said injunction on the ground that the facts stated in the petition were untrue, should be considered as submitted and for decision.

The case is before me for determination upon the naked legal question of the right of the defendant to proceed under the ordinance claimed to have been passed by the city council. Hence that part of the able argument of counsel upon the great value of the proposed improvement, the benefits to accrue to the city in event it is permitted to be made, and the public demand for the same, on one hand, and on the other hand the able argument on the question as to whether or not the city authorities have voluntarily surrendered, without sufficient consideration, a great and valuable franchise, and terminal facilities for a new railroad are not matters to be considered in determining the questions here submitted, but rather subjects which should have been, and probably were, addressed to the authorities having the power and right to grant such privileges.

I shall endeavor to deal solely with the legal phases of the question.

The first reason assigned for the invalidity of the ordinance is the want of public notice, as before stated.

Section 2502, Rev. Stat., provides that no ordinance of the nature of the one under consideration "shall be passed until public notice of the application therefor has been given by the clerk of the corporation in one or more of the daily papers, if there be such, and if not then in one or more weekly papers published in the corporation, for the period of at least three consecutive weeks."

In this case the affidavit of the assistant city clerk states that notice of such application was published one day in each of three consecutive weeks in three daily papers of general circulation in the city of Columbus, in two of which papers the publications were on the same day of the week for the three consecutive weeks.

Counsel for plaintiff contend that a notice once a week is not sufficient, but that the statute above quoted contemplates that such public notice if given in a daily paper should be given on the eighteen secular days of said period of three consecutive weeks.

This question was made in the case of *Simmons v. Toledo*, 3 Circ. Dec., 64. In that case, the identical issue arose. An application had been made to the city of Toledo for a franchise to construct and operate an electric street railway in the streets of that city. The judge deciding the case says:

"It is contended, however, that it was not legally published in this: First, that as a daily paper was selected, the notice should have appeared therein on every secular day for three weeks."

After discussing the subject, he concludes in these words :

"The publication of the notice in the one daily paper on the same day of the week for three weeks might properly be regarded by the council as sufficient, and would authorize it to proceed."

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I believe that in this case, as in that, the provisions of the statute have been complied with by the publication made. The reason for the legislature specifying a daily paper for such publication, if there be such, may be because it considered that the daily papers in the cities reached a greater number of persons who might be interested in the notice, than the weekly papers.

The second objection urged to the ordinance is dual in its nature. It is claimed, first, that the ordinance as originally introduced, was put upon its passage on April 9, 1900; that the yeas and nays were taken, and that the said ordinance was lost and so declared. A transcript of the proceedings of the city council has been submitted with the papers and is relied upon by both parties in so far as such transcript states the proceedings of the council. The transcript shows that on said April 9, 1900, the ordinance was duly reported back by the committee to whom it had been referred, not approved; that said committee was then relieved from further consideration thereof, and on motion the ordinance was placed upon its passage; the yeas and nays were called and there were seven votes in the affirmative and eleven in the negative, and the ordinance was declared lost.

Section 1694, Rev. Stat., provides that "ordinances of a general or permanent nature, shall be fully and distinctly read on three different days, unless three-fourths of the members elected dispense with the rule."

The ordinance was not read before being placed upon its passage. The rule requiring that ordinances of a general or permanent nature shall be read on three different days was not dispensed with. This ordinance is clearly one of a general and permanent nature. It had only been read on two different days, and hence could not be placed upon its passage without a third reading. The provisions of the statute in that respect are not merely directory, but are mandatory. Without a third reading, the calling of the vote on the passage of the ordinance was a nullity and the voting thereon, whether favorable or unfavorable, to the ordinance, was a vain and useless act. If a majority had voted in favor of the ordinance it is conceded that it could not have been considered carried. That being true, the ordinance would have remained before the council just as it would if no vote had been taken. The fact that a majority voted against the ordinance does not alter the rule. The ordinance was in exactly the same position before the council after the vote as before. Hence, the ordinance was not defeated at the meeting of the council on April 9.

This brings us to the next and most important question in the case. On April 2, at a regular municipal election, nineteen councilmen were elected to represent the nineteen wards of the city, the members so elected comprising the entire membership of the council. On April 16, said members-elect convened and organized as prescribed by statute.

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At the next regular meeting thereafter, on April 28, said council by the vote of the majority of its members, caused the ordinance heretofore mentioned to be read, said reading being styled by said council the third reading thereof. Counsel for plaintiff contend that the council before which said ordinance was read on April 28, was a new and different council from the one before which said ordinance was read on two other occasions, and that hence said ordinance must be read on three different days before the council as then constituted, unless the rule be dispensed with by a three-fourths vote of the members, before it could be placed upon its passage.

In other words, it is claimed that in the city of Columbus we have a new council every two years; that the old council dies at the expiration of the terms of the members constituting it, and with its death, all undisposed of business and legislation also dies, and that no matter pending before such council at the time of its demise can be considered by the council succeeding it except as such matters are introduced and considered *de novo*.

Until a few years ago the council of this city was constituted and elected as are the councils of most of the municipalities of our state. Each ward of the city was represented by two councilmen, and these members were elected in alternate years, so that one-half of the membership of the city council would hold over from year to year; but under the charter law each ward is represented by but one member in the city council, and all are elected at the same general election.

The character and life of a city council may best be determined by the statutory provisions respecting it. A city council is the creature of the statutes, and possesses and can exercise only such powers as are conferred upon it by the legislature.

Section 1, of the Charter Law provides that "the legislative power and authority shall be vested in a council which shall consist of one member from each ward in which the territory of the city may be divided * * *. Each member shall take the oath of office and shall hold his office for the term of two years, and until his successor shall be elected and qualified."

Section 3 provides the manner in which the council may legislate, and provides that certain ordinances, resolutions and orders shall, before they take effect, be presented to the mayor of the city for approval. It further provides that "the mayor, if he approves such ordinance, resolution or order, shall sign it, and if he does not approve it, he shall return the same to the council with his objections, within ten days thereafter, or if the council is not in session, then at the next regular meeting thereafter, which objections the council shall cause to be entered in full on its journal, and if he does not return the same within the time above limited it shall take effect in the same manner as if he had signed it."

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Section 9 of the charter law provides that "the council shall, annually at the time of its organization, elect a president and vice-president from its own body, and may elect a sergeant-at-arms and page, who shall perform such duties belonging to their respective offices as may be prescribed by ordinance and the rules of the council not inconsistent with law."

These sections of the charter law are quoted for the purpose of determining the plan and intent of the legislature in creating the council.

In this city, it places the power of legislation exclusively in that body, subject only to the veto power in certain instances. It provides for a city council and the election of members of that body from time to time. It provides for the organization and meetings of the council, but nowhere mentions a final adjournment of the body, and I am inclined to the opinion that the legislature contemplated that it should be considered as a continuous organization.

Section 1, above quoted, provides that each member shall hold his office for the term of two years, and until his successor shall be elected and qualified. By this provision a member of the city council may hold for a greater term than two years, if, at the regular annual election at which councilmen are to be elected, for any reason his successor should not be elected, or, if elected, he should fail to qualify, or he should die before the time for qualifying as such member. So the old member would continue to hold until another election and the qualification of such person as should be elected at such election. If the city council were considered as constituted as the legislature or the congress of the United States, this provision respecting the holding over of members of council, would be a vain and meaningless thing. If the council died at the end of every two years, how could a member of such council hold over when the body of which he was a member, had ceased to exist? It is for the very purpose of insuring that the council shall be a continuous body that the statute provides that members of the body continue such membership until their successors qualify.

Section 3 of the charter law provides that all ordinances, resolutions and orders of certain kinds, shall be transmitted to the mayor for his approval, and that if the mayor does not approve any such ordinance, resolution or order, he shall return the same to the council with his objections, within ten days thereafter, or if the council is not in session, then at the next regular meeting thereafter, which the city council shall cause to be entered in full upon the journal. This provision is not qualified as to time when such ordinance is transmitted to the mayor, and the rule is the same, whether such ordinance, resolution or order is passed at the last meeting preceding the installation of new members, or at some other time. It also provides that the council may by a certain vote, pass such ordinance, resolution or order over the veto of the mayor. The legislature certainly did not contemplate that one body

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could pass an ordinance and then die, and a new council come into existence, receive the veto of the mayor upon legislation of a defunct body and then act favorably upon such legislation over said veto. If the law-making power had contemplated the death of a council, it undoubtedly would have made some such provision for ordinances passed at the last session of a council, as is made by the constitution of the United States for bills not returned by the president because of the adjournment of congress before the expiration of the ten days within which otherwise they are to be returned if not signed.

Section 9 of the charter law provides for the annual organization of council by the election of its proper officers. If, in contemplation of law, a new council came into existence every two years, the law-making power would have provided that that body should elect its officers just as is done by the legislature and by congress. The fact that the election of such officers occurs annually shows that the law makes no distinction between the organization of the city coucouncil for the years in which its membership changes, and that in years in which there is no such change.

In other words, the council is a continuous body, sitting from year to year and with annual organizations.

Counsel for plaintiff have cited Beekman's Case, 11th Abbott's Pract. Rep., 164, in support of their position. The case follows, and is upon the authority of Wetmore v. Story, 22 Barb., 414.

In Wetmore v. Story, the court held that "the board of aldermen for the year 1853 could not take up, and pass, a resolution of the board of assistants of the year of 1852, authorizing the construction of a railroad in the streets of the city and give it effect as a law, without consulting the newly elected board."

In other words, it holds that in municipalities having a bi-cameral system of local government, ordinances must be passed by both branches simultaneously; that is, the enactment must be passed while both branches are holding office. This is reasonable, but can have no application to a body having a continuous existence, whose membership, or a part of whose membership, may change.

The brief for plaintiff contains a quotation from Dillon on Municipal Corporations. But a reading of the whole sentence discloses that the matter quoted refers to legislative bodies consisting of two branches and is upon the authority of the New York cases before mentioned. The language is this :

"The rule of legislative bodies, consisting of two branches, that unfinished business at the end of a session is discontinued and must be afterwards taken up anew, if at all, was considered applicable to the legislative acts of the common council of New York composed of a board of aldermen and a board of assistant aldermen."

The only authority supporting plaintiff's contention on this point cited, is a part of sec. 47, from Horr & Bemis' Municipal Police Ordin-

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nances. The text quoted is strictly in support of plaintiff's position. But the only case on the subject cited by the authors is directly opposed to it. This is the case of McGraw v. Whitson, 69 Iowa, 848, and comes nearer deciding the question made in the case at bar than any other case I have been able to find.

In the Iowa case, it is held that if there be a sense in which there is a succession of city councils, there is such immediate succession as to involve a substantial continuity, when taken with the fact that one-half of the aldermen hold over. And where a proposed ordinance was read on two separate days before the election of a new mayor and aldermen, and was read the third time after the newly elected mayor and aldermen had taken their seats, held: That sec. 489 of the code was sufficiently complied with and the ordinance was for that reason not invalid.

In his opinion, the learned judge deciding the case, says: "If there be a sense in which there is a succession of city councils (which we do not determine), there is such immediate succession as to involve a substantial continuity, when taken with the fact that one-half of the aldermen hold over; and we have no doubt that a continuity was contemplated by the legislature. We believe that the proper conduct of municipal affairs demands it."

And again he says: "We cannot think that it was intended that all unfinished business should be dropped at each council election and taken up again entirely new, if at all; to justify us in so holding, we think we should have something stronger than a mere inference."

And so, adopting the language and views of the court in the Iowa case, I am of the opinion that to justify me in holding that it was intended by the legislature that all unfinished business should be dropped at each council election, and taken up again entirely new, I should have something more than a mere inference.

The proper conduct of municipal affairs demands that there should be a substantial continuity of the municipal legislative body. The analogy between the city council and the general assembly, or the congress of the United States, is not sufficiently strong to be of controlling importance, and this view of the case is not in conflict with any of the text writers cited by plaintiff's counsel, except the text book on Municipal Police Ordinances.

The Iowa case is cited by leading text writers on municipal affairs, including Dillon and Tiedeman.

"A requirement that a proposed ordinance shall be read on three different days, is fulfilled if it be so read, even when the final reading takes place after the election and induction into office of a new mayor and of several new members of the municipal council. The prescribed reading may also be had at an adjourned meeting." Tiedeman on Municipal Corporations, sec. 148.

It is urged that the amendments of April 23 were material. The amendments made to the original ordinance were not such material amendments as to require that such ordinance as amended should be read on three different days, and I do not consider that this objection is a substantial one.

The final contention of plaintiff is that the ordinance does not provide the intended loop, and that hence the whole plan is abortive. The purpose and scope of the ordinance is disclosed by its title. The body of the ordinance is in harmony with the plan so disclosed, and the fact that a portion of the route fails for lack of proper consents of abutting owners does not render the ordinance invalid. The municipality may make a new grant, as to that portion of the route, when the necessary consents are obtained. *Sanfleet v. Toledo*, 8 Circ. Dec., 711.

But the defendant does not concede that they have not obtained sufficient consents as alleged by plaintiff, and this becomes a question of fact to be determined if the case should hereafter be tried upon the facts.

The plaintiff has alleged that the defendant failed to produce to the said city council the written consents of the owners of more than half of the feet front of the lots and lands abutting on the public ways along which it is proposed, under the authority of said ordinance, to construct said railway. Plaintiff's petition is verified positively.

To meet this the defendant has filed the affidavit of one H. A. Fisher, who avers positively that the defendant produced to said council the written consents of the owners of a majority of the feet front of the lots and lands abutting on such streets and avenues along such portions thereof as are covered by said franchise for the construction of a street railway by said defendant on such portions, and that a sufficient number of said consents was so produced and were in the hands of said council at the time the said ordinance was read the third time and passed, on April, 23, 1900.

The burden of proof is upon the plaintiff.

The petition offered as an affidavit is off-set by the affidavit offered by defendant denying the statements of plaintiff in this particular, and plaintiff has therefore failed to show by a preponderance of the evidence that the requisite number of consents have not been obtained.

R. H. Platt, J. H. Collins, J. G. Mitchell, for plaintiff.

Merrick, Tompkins & Sharp, for defendant.

POLICE COURT JURISDICTION.

[Police Court of Columbus August, 1900.]

STATE OF OHIO v. JESSIE D. VORIS.

1. ACT REQUIRING TWO-THIRDS VOTE.

An act of the general assembly extending jurisdiction of the police court to hear and finally determine all misdemeanors committed within the limits of the county in which the court is situate, which is not enacted by a two-thirds vote of the members of each house, is unconstitutional and void.

2 ACT EXTENDING JURISDICTION AND EXCLUDING CITIZENS FROM JURY VOID.

An act of the general assembly giving jurisdiction to the police court to hear and finally determine misdemeanors committed within the limits of the county in which such court is situate, which excludes, in cases where imprisonment is a part of the penalty, from jury service, the citizens in that part of the county over which the jurisdiction is extended, is in contravention of the constitutional right of trial by jury of the county or district in which the offense is alleged to have been committed.

EARNHART, J.

Section, 1788 Rev. Stat., as amended in 1896, provides that in counties where there is a city of the first grade and second class (Columbus) the police court shall have jurisdiction to hear and finally determine all misdemeanors committed within the county.

Article 4 sec. 1, of the constitution of the state provides the judicial power of the state shall be vested "in a Supreme Court * * * and such other courts * * * inferior as the general assembly may from time to time establish."

Section 15, art. 4, provides for the establishment of such inferior courts "whenever two-thirds of the members of the general assembly elected to each house shall concur therein."

The granting of or creating of jurisdiction to the police court of the city of Columbus, Ohio, over the entire county of Franklin is the establishment of a new inferior court over and for the territory of the county not embraced within the city limits.

An inspection of the journals discloses that but twenty-two members of the senate and fifty-eight members of the house voted for the creation or establishment of this inferior court over the county, and as the act thus received the concurrence of less than two-thirds of the members elected to each house, the purported act is in violation of sec. 15, art. 4, and therefore invalid.

The municipal code of 1869, 66 O. L., 176, sec. 167, provides that the police court shall have jurisdiction of any misdemeanor committed within four miles of the city limits. This section of the municipal code was sought to be amended by the act of March 30, 1876, making the jurisdiction coextensive with the county.

If sec. 1788, as amended upon March 30, 1876, is invalid, is the original section containing the act of 1869, still in force?

Columbus Police Court.

The act of March 30, 1896, 92 O. L., 97, contains a number of sections relating to the powers of the police court; the proceedings when prisoners are arraigned; recognizances; duties of sheriffs and fees of police.

Section 7 of the act provides: "That said original sections 1788, 1804, 7147 and 7161, of the Rev. Stat., be, and the same are, hereby repealed."

It cannot be said the whole of the act of March 30, 1896, is void for the subjects thereby various sections legislated upon except that of sec. 1788 require but a majority vote of the general assembly, and so were constitutionally enacted. It is true sec. 1788 is expressly repealed. It is also true that it does not require a two-thirds vote of the general assembly to repeal an act requiring the two-thirds vote by the constitution for its enactment. *State v. Wright*, 7 Ohio St., 884-6.

But the weight of authority is, where an act repeals another act and provides a substitute for the original act, that if the substitute or amended act is invalid, the repealing section also fails. *State ex rel. v. Smith* 48 Ohio St., 211; *Whitney v. Gill*, 8 Circ. Dec., 450; Sutherland on Statutory Interpretation, sec. 175-6.

It follows, that the act of 1869 extending the limits of final jurisdiction to within four miles of the city limits, is valid unless it conflicts with some other constitutional provision.

2. There are eighteen populous townships outside of the corporate limits of the city of Columbus, within the county of Franklin, and some of these townships contain large and prosperous villages.

The act of the general assembly providing the police court shall hear and finally determine all misdemeanors committed within the limits of the county where any such court is situate, makes no provision for a trial by jury in these cases where imprisonment is a part of the punishment or penalty, and the only jury that can be demanded is one of the citizens of the city where such court is situate, and under rules and regulations provided by the judge and councilmen of such city.

Article 1, sec. 10, of the constitution provides the accused shall have a "speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed."

The citizens of these villages and eighteen townships lying outside of the corporate limits of Columbus have no right or voice in the selection of court or jury, and are excluded from jury service, even although the alleged offense was committed in their vicinity, and without the corporate limits.

The principal part of the county of Franklin is thus in fact made a colonial possession of the city of Columbus, and the citizens of the county outside the city limits can be arrested, tried, convicted and imprisoned by a court they did not aid to select and by a jury from which they are excluded.

State v. Voris.

If there was any more radical use or abuse or usurpation of power prior to 1776 by the English government over the colonies, we are not informed as to its nature.

"The constitution obviously intends the jury shall be drawn from the whole body of the county, or from the whole body of the district affected by the law and not to exclude a part." 86 Mich., 40; 71 Mich., 287.

We do not believe in the extending of jurisdiction to tribunals in which the inhabitants can only appear as culprits.

In the case decided in the 89 Iowa, 631, the court held while the sheriff was required to select jurors from the body of the county, "If he summoned from the people of the county at large, taking them from as many townships as was reasonably practicable, this was a substantial compliance."

This makes the converse of this proposition the law; if the sheriff refuses to select the jury from the county at large or as many townships as was reasonably practicable, his acts would be illegal. Morarity v. Boone Co., 89 Iowa, 631.

"The general assembly cannot give power to a court outside its district to hear and finally determine the guilt or innocence of the accused, and exclude from the jury his neighbors, so he has not the benefit of his own good character and standing." Olive v. State, 11 Neb., 1.

"The legislature cannot direct the selection of a jury from a part of the county to the exclusion of the rest." Hartshorne v. Patton, 2 Dall. (Pa.), 252; Shaffer v. State, 1 How. (Miss.), 238; People v. Coughlin, 67 Mich., 466.

The right to a trial by jury cannot be abridged. Gunsaulus v. Pettit, 46 Ohio St., 27.

Nor can the general assembly impair the right or materially vary its character. Work v. State, 2 Ohio St., 297.

"The complete exclusion of the inhabitants over which the jurisdiction is extended is not a jury at common law, nor as contemplated by the constitution." 8 Black. Com., 352-5.

This act in controversy is illegal because it "assumes to confer the power of police regulation of judicial jurisdiction, over a number of outlying suburban incorporated villages." State v. Cincinnati, 20 Ohio St., 18, 37.

"The law of England prior to the war of the revolution was satisfied if the jury was returned from any part of the county, but by decisions of several states and by constitutional enactments the jury is required 'of the county or district.'"

This excludes the old practice of the British government. This constitutional inhibition prevents the selection of a jury except coextensive with the county or district over which the jurisdiction extends.

Columbus Police Court.

"The jury must be selected from the vicinity where the crime is committed." Cooley on Con. Lim., 891.

The selection of a jury from one part of the county and the exclusion of the remaining part of the county over which jurisdiction is extended is destructive of a valuable right of freemen. White v. Com., 6 Benn. (Pa. St.), 179; Wise v. Otter Creek L. Co., 89 Mich., 40; State v. Cincinnati, 20 Ohio St., 18; 41 N. H., 550.

The cases in Ohio that appear inconsistent with this view are *Ex parte Hagenschneider*, 2 Dec., 549, and *Fletcher v. State*, 7 Circ. Dec., 816.

The first case does not consider the question of final jurisdiction, but of original jurisdiction, the right to hear at all, and bind over to a court of final jurisdiction; and in the Fletcher case the only question decided is that the police court may proceed to final judgment in cases where the accused is not entitled to a trial by jury.

There is nothing inconsistent in the decisions herein nor as found in the *Woolweaver v. State*, 50 Ohio St., 277-87 and *Muskegan v. Moss*, 7 Ohio St., 378, 383, as an investigation will disclose.

The evidence discloses the offense charged, petit larceny, was committed outside of the corporate limits of the city of Columbus and that the accused was committed to this court by an examining magistrate.

The prisoner will be remanded to the magistrate for proper proceedings, recognizing the prisoner to the common pleas court upon bond, or committing him upon default of bail to answer to that court.

RAILROAD CROSSINGS—NEGLIGENCE.

[Cuyahoga County Common Pleas, January Term, 1899.]

GEORGE O. WATSON, ADMR., v. ERIE RAILROAD CO.

1. UNLAWFUL RATE OF SPEED NOT ITSELF NEGLIGENCE.

The mere fact that a railroad train was running at an unlawful rate of speed at a public crossing does not, of itself, constitute negligence. There must be some other element in the situation to constitute negligence.

2. RULE AS TO DETERMINATION OF RATE OF SPEED.

If data are furnished by which the speed of a railroad train can be determined, the question whether the train was running at an unlawful rate of speed should go to the jury. If not, it is then a question of law for the court.

3. SPEED TO BE DETERMINED LIKE OTHER FACTS.

The rate of speed is a fact to be established like any other fact. The statement of a witness that the train was "fast," without testimony as to the usual rate of speed, is not such evidence as furnishes data by which the judgment of a jury can be applied and the rate of speed determined as a basis for the charge of negligence, even if there are other facts connected with the case which might properly be submitted to the jury.

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4. RULE AS TO PROOF OF WHISTLE WHERE THERE ARE TWO CROSSINGS.

The statute makes the failure to blow the whistle within the prescribed distance from a public crossing a ground of recovery, but where, within the statutory distance from a crossing there is another crossing, so that necessarily, in order to comply with the law, the minimum distance at which the whistle could be blown for the crossing in question would be beyond the other crossing, this fact puts the plaintiff upon proof that a whistle blown beyond the first crossing was not blown within the statutory distance from the crossing in question.

5. FACT CAN NOT BE PROVED BY MERE OPINIONS.

Under circumstances stated in preceding paragraph, the question whether the whistle was blown within the prescribed distance from the crossing in question can not be proved by mere opinions of witnesses, that it was blown for one crossing or the other; such fact must be proved by showing that the train was within the limits and the whistle was or was not blown.

6. DUTY OF RAILROAD COMPANY AND PERSONS AT CROSSINGS.

The engineer of a railroad train is required to use ordinary care to ascertain if a person at a public crossing is in danger; and by the exercise of that care to save him if he can, but it is also the duty of a person at the crossing to exercise ordinary care on his part to avoid injury when he finds himself in a critical place or can ascertain by the exercise of ordinary care that he is in imminent danger. The two propositions form the complement of the law on the subject.

7. FACTS WHICH DEFERAT RIGHT TO RECOVER.

A man has the right to rely upon performance of duties which the law imposes upon a railroad company at crossings, whenever it is not apparent, to one exercising ordinary care, that the company has not complied with its duty. But where a look would have revealed the fact, and that danger was imminent, as where, in broad daylight, at a crossing where the track was straight and the view unobstructed, and the whistle of an approaching train was blown for another crossing but could be distinctly heard and the train plainly seen from the crossing in question, a person injured under these circumstances cannot recover.

Decision of the court upon the defendant's motion that the court direct a verdict for the defendant.

LAMSON, J.

There are three charges of negligence in this petition made by the plaintiff against the defendant company.

First, the rate of speed; and I have already said that I thought the rule was as laid down in L. S. & M. S. Ry. Co. v. Schade, 8 Circ. Dec., 316, and that is, that the rate of speed, standing by itself alone, under circumstances at a crossing, conceding this to be a public crossing—and all I shall say on this motion will apply to it as a public crossing—does not constitute negligence. There must be some other element entering into the relationship and the situation to make the rate of speed negligent, even if you had the rate of speed. But in this case it seems to me there is no evidence that fixes the rate of speed. There are no data furnished by which the rate of speed in this case can be determined. If there is evidence upon that proposition, at least it may go to the jury. But if there is not, then it is a question of law for the court. That is my judgment from this testimony: No witnesses called. The rate of speed is a fact to be established like any other fact. It is true, it involves in itself much of the elements of an opinion; but that is because

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of the nature of the subject matter of fact to be established. You can call your witness, who tells what he saw, and he says, giving his best judgment upon questions of distances and so on, the rate of speed was so-and-so; or, you could establish certain points of passage and time which would fix it. Nothing of that kind is done in this case.

One witness says the train was going fast—going at the usual rate of speed. Nothing to show what the usual rate of speed was, and nothing to show what the witness' idea of "fast" was. One man considers a thing rapid; another man considers it slow. It furnishes no criterion or data by which the judgment of the jury can be applied and the rate of speed determined, as a basis for the charge of negligence, even if there are other facts and circumstances connected with this crossing which would make it a matter to go to the jury upon.

Second, the failure to blow the whistle. That, the statute makes a ground of recovery, fixes the liability for all damages resulting therefrom upon the company, for failure to blow the whistle within the prescribed distance from the crossing.

But it appears that within that distance from this Boylston street crossing, was another public highway crossing (Miles avenue crossing). So that of necessity, in order to comply with that law, the minimum distance at which that whistle could be blown for Boylston street crossing would be beyond this other public crossing. That being so, I think it puts the plaintiff upon proof that a whistle blown beyond Miles avenue crossing was not blown between eighty and one hundred rods from Boylston street in order to establish the fact that it was not blown for the crossing at which the plaintiff's intestate was killed, to establish that whistle's having been blown outside of those limits and within the limits for the other crossing.

I do not think there is any presumption of law that establishes any fact, whether of duty or not, in connection with the charge of negligence. There is no presumption of negligence. I do not think there is any presumption of law that will establish any fact which is a necessary basis upon which to predicate this charge of negligence.

I do not believe there is any presumption of law that this whistle, which the witnesses say was blown for Miles avenue crossing, without giving where it was blown, the distance from Miles avenue at which the train was, at about the time it was blown, or any data from which that fact can be determined; I do not believe there is any presumption of law that that whistle thus blown, was blown for Miles avenue crossing rather than for Boylston crossing; If the latter is a public highway and one with reference to which the law says the whistle must be blown. As the minimum is eighty rods and the maximum one hundred, it is a fact not to be proven by the opinion of witnesses; that is, it is to be proven by showing that the train was within those limits in order to establish the fact that it was blown and the law complied with, or,

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that it was between those limits and it was not blown, in order to establish the fact that the law was not complied with ; not the opinion of the witnesses that it was blown for Miles avenue crossing, or was blown for Boylston crossing, especially under the facts and circumstances. That disposes of the first two specific charges of negligence.

The other charge is, that the engineer in charge of this train, having control of its operation, or the persons having control and operation of it, by the exercise of ordinary care could have seen the decedent in time, by the exercise of such care and skill, to have stopped the train or checked it, and permitted him to escape ; and that brings us face to face with the doctrine laid down in the L. S. & M. S. Ry. Co. v. Schade, *supra*. That was affirmed by a divided court in the circuit court ; it was affirmed by the Supreme Court without opinion. And as I laid the doctrine down in this court in the Schade case I have a pretty clear idea, so far as that case was concerned, of what its limitations was in my own mind, and its applicability ; and I have since had occasion to apply it with its proper limitations.

In L. S. & M. S. Ry. Co. v. Schade, *supra*, this condition existed : First, a dangerous railroad crossing; nota simple crossing with no elements about it which would particularly distinguish it over and above any other crossing, but a railroad crossing at which and as to which the railroad company was charged with knowledge and notice that a large number of people had been injured and killed, because of certain conditions existing at that crossing to which they were a party ; not that strangers had, but which the railroad company in itself had, permitted to exist. Then the parties were in mid-winter, and at a late hour in the night. All those conditions existed at that time. There was no evidence in that case to show what was done or was not done by the decedent ; that had to be presumed and inferred by the situation. He was in a wagon, situated as a person would be at that time of year, driving home at a late hour at night, having finished his business. He had his boy with him, his groceries and other things in the wagon, muffled up, as men would be under those circumstances, with a horse and wagon. The proof showed that the train was coming at from forty-five to over sixty miles an hour. There was a curve in the road, and coming out in sight around that curve a person on the track would not be able to see the light of the locomotive in time to have escaped by any possible exertion that he might make with his horse and wagon, before the engine would strike him at that rate of speed. It would cover in a bare second of time that space at that rate ; in that situation, and with those facts, the court charged the law as it has been stated.

But with that goes this proposition, whenever the case calls for it that it seems to me relieves it from the criticism of Judge Hale upon that proposition as laid down : It becomes a question of what constitutes proximate cause, and it all lies in the solution of that proposition.

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Judge Hale says, (see L. S. & M. S. R. v. Schade, *supra*), in substance, in his dissenting opinion in the circuit court in the Schade case, "I cannot see, if a man is negligent in going upon a track, and the driver of the locomotive is negligent in not seeing him and stopping his train, how you can say that one is more the proximate cause than the other, and distinguish between them. Unless you can, then the rule is wrong and should be changed." But I think when you give the full complement of the proposition there established and set forth, when the case calls for it (and I think it is applicable in this case now before us) while the engineer and driver of the train is held to exercise ordinary care, and to ascertain if a person at a public crossing is in danger, and by the exercise of that care to save him if he can, there comes this duty upon the person thus on the crossing, to exercise ordinary care on his part to avoid injury when he finds himself in a critical place, or could ascertain that he was in a place of imminent danger by the exercise of ordinary care. When you take those two propositions together, then it makes the complement of the law upon that subject, in my judgment; and the failure to exercise care on the part of the railroad engineer would be negligence under those circumstances; and the failure to exercise such care on the part of the person crossing at that time would be negligence; and those two would be proximate causes, and not the negligence in going into the place of danger.

Let us look at the situation in the case before us here. Here is a perfectly open situation, in broad daylight. Here is a straight track. There is no particular obstruction in the way of seeing this train approaching for a long distance. Here is Miles avenue crossing above, with the whistle blown for it only (as now, for this purpose, we may concede), but so that it can be heard distinctly down at this Boylston street crossing and clear beyond it; so that persons around about there act upon that whistle; persons located further away from that train than this person, looking up, see the train coming, see that it is going at such a rate of speed that persons ought to use care and activity in getting away from the track. And we have the decedent there where he is, in a position of danger, close to the track, with all that that charges him with, a pedestrian, nothing to do but step away from it; struck when he is off the track; the slightest care upon his part, certainly the exercise of ordinary care on his part, on that occasion, would have enabled him to ascertain the approach of this train and to have stepped away from it and let the train pass.

Judge Ingersoll says; and it is a very applicable proposition in the case, that he had a right to rely upon this whistle being blown, applying the doctrine that has been applied in regard to ordinances, as to whistles and as to bells, etc. True, a man has a right to rely upon the performance of the duties which the law imposes upon the railroad company at crossings, or any other place, whenever it is not open and apparent

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before him, at least by the exercise of ordinary care, that they have not complied with them. Concede that the railroad company was not blowing the whistle for this crossing, but was blowing it for the other crossing, and that the decedent supposed that it was blown for the other crossing, and that therefore it was more than one hundred rods or so away from him. Yet but a look—and men are held to know what, under ordinary circumstances, is apparent—but a look under those circumstances would have revealed to him the fact that his supposition was not true, that the train was near him and that his danger was imminent, and that he must use care and activity proportionate to the situation to get out of the way.

I think, gentlemen, this motion should be sustained. I think it does not come within the doctrine in L. S. & M. S. Ry. Co. v. Schade, *supra*. It shows a situation where, in the exercise of ordinary care by the decedent he would have known that he was in imminent danger, and by the exercise of ordinary care on his part, could have got away.

Burke & Ingersoll, for plaintiff.

Williamson, Cushing & Clarke, for defendant.

SCHOOLS—BOXWELL LAW.

[Ashland County Common Pleas, 1900.]

BOARD OF EDUCATION (ASHLAND TWP.) v. BOARD OF EDUCATION (MONTGOMERY TWP.)

1. RULE AS TO WHEN "MAY" MEANS "MUST" OR "SHALL."

The word "may" means "must" or "shall" only in cases where public interests or rights are concerned, or where the public or third persons have a claim *de jure*, that the power shall be exercised, or where something is directed to be done for the sake of justice or the public good.

2. RULE APPLIED TO BOXWELL LAW.

Under the Boxwell law (Sec. 4029, Rev. Stat.), in which, when first introduced, it was provided that the high school tuition of certain graduates "shall be paid by the board of education of the township in which such applicant resides," and which was changed by the committee to read "may" instead of "shall," and so enacted, in which form it remained for eight years, or until 1899, when the legislature substituted the word "shall" for "may," a school board is not bound to pay tuition in a high school in an adjoining county accruing during the time when the law remained as originally enacted. During that time the word "may" did not have the force of "must" or "shall."

3. NO CONSTITUTIONAL GUARANTY TO WARRANT SUCH PAYMENT.

The constitutional guaranty of "an efficient system of common schools throughout the state" does not impose an obligation upon township boards to pay the tuition of a few pupils who elect to enjoy the advantages of a high school outside the township of their residence, either in the same or an adjoining county.

CAMPBELL, J.

This action was commenced before a justice of the peace by plaintiff to recover of defendant \$14.40 for tuition of one Frank M. Bailey, under the provisions of what is known as the "Boxwell law," and came into this court by appeal.

The plaintiff states in the petition that it admitted said Bailey to the Ashland schools, he being a resident of Montgomery township, outside of Ashland village district; that said Bailey, prior to his admission to said village district, had been examined by the county board of school examiners, a certificate had been granted him, as provided by law, and on presentation of said certificate, he was admitted to the Ashland village schools and attended said schools from September, 1898, until the close of the school year in 1899, and that under the laws of Ohio the defendant board is liable for such tuition.

The defendant admits, substantially, all the statements of the petition to be correct but denies its liability under the law. The plaintiff's right to recover depends on the construction to be given the law in question.

The law as originally passed provided for holding examinations of pupils of sub-districts and special districts, by the county board of school examiners in certain branches twice a year, and a certificate granted to any such pupil enabled him to enter any high school in the county.

In 1894 the first section of the act was amended, providing among other things that "the tuition of such applicant may be paid by the board of education of the township in which such applicant resides."

In 1896 this section was again amended making his admission to such high school dependant "upon the payment of tuition" and that said "tuition may be paid by the board of education of the township in which said applicant resides." Such were the provisions of the law in force in 1898 and 1899, applicable to this case.

The original act also provided for the granting of "diplomas" to successful applicants "who should deliver an oration or declamation, or read an essay in some public place provided by the clerk of the township board of education," and sec. 3 provided that "the tuition of such graduates may be paid by the board of education of the township where such pupils may reside."

It would appear from the law that two classes of pupils were designated, to-wit: successful applicants at examinations before the county board of school examiners, and those granted diplomas as above indicated in addition to holding certificates.

Unless the word "may" means "shall," the plaintiff is not entitled to recover.

Ashland Township v. Montgomery Township.

The rule of construction generally approved in this class of cases is the following: "The word 'may' means 'must' or 'shall' only in cases where the public interest and rights are concerned, or where the public or third persons have a claim *de jure*, that the power should be exercised, or where something is directed to be done for the sake of justice or the public good."

It is the duty of the court to ascertain if possible the intention of the legislature when called upon to construe doubtful or ambiguous enactments, and the following rule is laid down in 130 Indiana, 561. "The courts will look to the whole statute and all its parts, and when such intention is ascertained, it will prevail over the literal import and strict letter of the statute; and where the meaning is doubtful and uncertain, the courts will look into the situation and circumstances under which it was enacted; to other statutes if there be any upon the same subject whether passed before or after the statute under consideration."

Applying this rule, how should this law be construed? The Boxwell bill as first introduced, contained the word "shall" in the third section. It was referred to the standing committee on common schools, and among other amendments recommended, was the substitution of the word "may" for "shall" and in this way it passed. The present general assembly has again amended the law by substituting the word "shall" for "may" in both the first and third sections. For eight years the legislature persistently refused to give the enactment mandatory operation upon township boards of education, though frequent efforts were made to change the phraseology to that effect.

From a somewhat careful investigation of the question submitted I fail to find that "may" as used in this statute should have the force of "shall," and for that reason judgment should be rendered for defendant.

Even if the word "may" has the significance of "shall," or if the action would be governed by the law as recently amended, would the plaintiff be entitled to recover?

If the clause in the law as it now stands means what its language imports, that successful applicants or graduates are permitted to enter any high school in the county, or in an adjoining county, "upon the payment of tuition" the payment of such tuition is a condition precedent to their admission, and the high school is not bound to admit them until it is paid.

In the first instance, who is to pay, and how? Township boards of education are authorized to levy a tax for the maintenance of the public schools within the township, and every pupil between six and twenty-one years of age is entitled to the benefits to be derived therefrom. Township high schools may be organized and supported in this way, and all pupils have access thereto; but the constitutional guarantee of

"an efficient system of common schools throughout the state" does not, in our opinion, impose an obligation upon township boards to pay the tuition of a select few pupils who elect to enjoy the advantages of a high school, outside the township of their residence, either in the same, or in an adjoining county. For this reason also our finding is for defendant.

McCray & McCray, for plaintiff.

H. A. Mykrantz, for defendants.

CONVEYANCES—DEBTORS AND CREDITORS.

[Clermont Common Pleas, 1800.]

* MALINDA HEDRICK V. GEORGE H. GREGG ET AL.

1. DECLARATION OF GRANTOR IN DEROGATION OF TITLE NOT ADMISSIBLE.

Declarations by grantor in a deed of conveyance, made after the conveyance and in the absence of the grantee, are not admissible evidence in derogation of the title conveyed in the deed, unless collusion or conspiracy between the parties, that the deed was executed for fraudulent purposes, is shown.

2. DEED SUSTAINED WHERE DEBTOR RETAINS ENOUGH TO PAY HIS DEBTS.

A conveyance of land, where the grantor has ample means left to satisfy all debts he has at the time of such conveyance, will not be set aside as fraudulent on the petition of a subsequent creditor, unless it is shown that such conveyance was made in contemplation of becoming a debtor of such subsequent creditor.

3. WHERE CONVEYANCE FRAUDULENT—OTHER CREDITORS' RIGHTS.

If, however, the conveyance at the time was made with the intent to defraud the creditors of the grantor, a subsequent creditor may avail himself of this fraudulent character of the conveyance and have it set aside.

4. WITHHOLDING DEED FROM RECORD WITHOUT FRAUD.

Unless it appears that grantee acted from corrupt motives, the fact that he withheld a deed from record for a long time is not material. Thus where it appeared that G, in 1888, owning real estate and being solvent, became surety on a note with his father, and in 1891 deeded a portion of his land to his mother, but retained sufficient to more than pay his indebtedness, and subsequently purchased more land, but in 1896 became insolvent, the holder of the note which was renewed in 1892, while G was still solvent, having made no effort to collect until after G's assignment in 1896, is not entitled to have the conveyance from G to his mother, in 1891, set aside although the deed was not recorded until in 1895.

The record, evidence and uncontested testimony offered herein by plaintiff shows:

January 14, 1888. A bastardy proceeding was begun against Geo. H. Gregg in case No. 8911, by Samantha J. Pribble, who was then twenty-five years old.

February 2, 1888. Plea of guilty in case No. 8911, judgment for \$800, and same paid in full by Geo. H. Gregg. Journal D, 2nd, page 180.

* Since writing opinion in this case, attention has been called to the case of *Jones v. Leads*, 10 Dec., 173.

That case had been already read and considered. The difference between that case and this, renders that valueless as authority in this case. Jones was an existing creditor at the time of the conveyance, Mrs. Hedrick was not.

MARKLEY, Judge.

Hedrick v. Gregg.

February 24, 1888. Deed from Geo. H. to Chas. H. Gregg, executed conveying real estate in petition described.

February 25, 1888. Deed recorded in book 128, page 821.

March 19, 1888. Mrs. Hedrick receives money, about \$2,000.00, from Louis Bonar's estate and deposits same in Felicity Bank.

April 12, 1888. Elizabeth Moyer, the mother of Samantha J. Pribble, sues Geo. H. Gregg for damages for loss of her daughter's services through seduction in case No. 8970, which case was afterwards settled for \$50.00.

May 5, 1888. Geo. H. Gregg borrowed \$1,000.00 from Mrs. Hedrick, with Chas. H. Gregg as surety. Charles then owned ninety-two acres of land in one tract, eleven and one-half acres of land in another tract, and a warehouse in Felicity worth \$500.00, and chattels, all worth \$5,000.00 or more, and Charles then being single and out of debt except for the surety debt on this Hedrick note.

January 31, 1891. Charles H. Gregg deeded the land described in the petition to Susan Gregg, he still being single and still owning the 92 acres, the 11½ acres and the warehouse, and being out of debt except on the Hedrick note.

December 17, 1891. Charles H. Gregg married.

March 21, 1892. Charles H. Gregg bought 108 acres more land for \$5,400.00, going in debt for two-thirds of the purchase money or more.

May 4, 1892. Hedrick note renewed for \$1,166.40 for one year. Signed by Geo. H. and Chas. H. Gregg.

April 26, 1895. Deed from Charles H. Gregg to Susan Gregg, recorded in deed book 136, page 190.

September 12, 1896. Charles H. Gregg makes an assignment for the benefit of creditors.

September 14, 1896. Malinda Hedrick sues on her note.

November 21, 1896. Judgment for \$1,103.15 on Hedrick note.

January 15, 1897. Execution issued on Hedrick judgment and levied on land described in the petition.

January 20, 1897. Petition herein filed.

October 14, 1897. Amended petition herein filed.

MARKLEY, J.

At the trial of this case plaintiff to maintain the issue on her part offered certain testimony, to the admission of which the defendant, Susan Gregg objected; and it was then agreed by counsel that the court should hear all such testimony and pass upon its competency on the final disposition of the case.

The principal portions of the testimony objected to were the declarations of George H. Gregg, testified to by John Walker, Esq., Mr. Bollander, the plaintiff, and her son and daughter, and his statements made before the probate court, as shown by the transcript offered in evidence.

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Objections, also, were made to the declarations of Charles H. Gregg.

These declarations of George H. Gregg, alleged to have been made at different times, were all made after he had conveyed the land in dispute to his son, Charles H. Gregg, and in the absence of said Charles, and the defendant, Susan Gregg.

There was a total absence of positive proof to show collusion, or conspiracy among the defendants at the time of the conveyance from George H. Gregg to his son Charles, and the conveyance from Charles to his mother, Susan Gregg, or either of them, to defraud the plaintiff, or any other then existing or subsequent creditor; therefore, by well settled rules of law, these declarations of George H. Gregg could not be heard to impeach the title to the land granted by him. Webb's Adm'r v. Roff, 9 Ohio St., 480-2; Ohio Coal Co. v. Davenport, 87 Ohio St., 194; Gay v. Gay, 26 Ohio St., 402; Voss v. Murray, 50 Ohio St., 19.

The declarations of Charles were also inadmissible, but mainly on the ground that he, being admittedly a trustee and having no beneficial interest in the property, could have been called as a witness by plaintiff. His declarations would be admissible only as those of a co-conspirator.

Had the plaintiff established a case by any competent evidence that these defendants had conspired to defraud plaintiff, or even Mrs. Moyer, there might be some reason for claiming the declarations to be admissible. When the conspiracy is once established, the acts and declarations of one conspirator may be given in evidence against all. This is the rule even in criminal cases. But how does this case stand? Has the plaintiff shown any collusion among the defendants to defraud her? Certainly not by any positive testimony. There was not any testimony offered tending to prove that George H. Gregg, at the time he deeded the land to his son, contemplated becoming the debtor of Mrs. Hedrick, or of any other person. But there was testimony offered, and properly admitted (Evans v. Lewis, 30 Ohio St., 11), tending to prove that he was indebted to his wife, and he had often promised to deed to her the land, and that the conveyance to Charles was in trust to him for Mrs. Gregg in satisfaction of that indebtedness. It is urged, however, that the suit of Mrs. Moyer for damages for the seduction of her daughter was then threatened, and very shortly thereafter commenced, and that the court is asked to infer from these facts that the conveyance was made in anticipation of a judgment in that case. The evidence tended strongly to show that the Pribble woman—Mrs. Moyer's daughter—was twenty-five years old at the time of the alleged wrong, and that she had long forsaken the maternal roof, and had been doing for herself. These facts must have been known to the parties and their attorneys, and the only surprising thing, under the circumstances, is the fact that Mrs. Moyer recovered anything at all. Certainly there was nothing in the case of such grave

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aspect as to justify the belief that Gregg conveyed the land to avoid any judgment that might be obtained therein. On the other hand he had just satisfied the judgment in the bastardy proceeding; he was indebted to his wife for money received years before, and, for which, he had promised to deed to her the land (this is true unless Gregg deliberately perjured himself), and, therefore, was then under a moral, if not legal, obligation to repay her. He was not then in debt to plaintiff, not to anyone else, as far as the testimony discloses. Mrs. Moyer's cause of action then existed, if she ever had any which would become a debt after judgment. And, of course, if the only consideration for making the deed to Charles was to defeat the collection of Mrs. Moyer's claim, she could, after having obtained judgment, have set it aside; and being fraudulent in its inception, and fraudulent in fact, Mrs. Hedrick, though a subsequent creditor, could avail herself of its fraudulent character and have it set aside. Webb's Adm'r v. Roff, 9 Ohio St., 430; Crumbaugh v. Kugler, 2 Ohio St., 374; Bowlus v. Shanabarger, 10 Circ. Dec., 167.

But as has been stated there was nothing in Mrs. Moyer's claim to excite reasonable apprehension of danger. Besides, if the motive for making the conveyance had been to avoid paying her anything, why was not the land reconveyed to George in 1891, after the Moyer case was settled? At that time surely it would have been to the interest of Charles to have had it done. That he could have done it there can be no doubt. He still held the deed which he had prepared on January 31, 1891, to give to his mother. He did not deliver it until shortly before April 26, 1895, when it was recorded. Counsel for plaintiff in their brief urge this fact as the strongest, most suspicious circumstance indicating the fraudulent character of the whole transaction.

Admittedly Charles was a trustee. All parties agree to that, the only contention being, who was the beneficiary, his father or his mother? His action in preparing the deed in January, 1891, and not delivering it until 1895, seems strange, if not unaccountable. It is difficult to assign any reasonable motive therefor. It is true that plaintiff claims it was only a part of the scheme, to defraud Mrs. Moyer and herself. Mrs. Moyer's claim was satisfied in July, 1891, and still Charles held the deed nearly four years thereafter before delivery. Now, what motive, if any, actuated him in doing so? What foundation is there for claiming that his motives, if he acted from motive, were fraudulent and corrupt? Because if he did not act from corrupt and fraudulent motives, it is immaterial why he held the deed so long.

A general view of the transaction sheds some light on this question.

Mrs. Hedrick testified that at the time George borrowed the \$1,000, he told her that he owned the land in question, and that she loaned him the money on the faith of that statement. (This declaration of Gregg's, like the others, was not admissible.) Mrs. Hedrick may not have had

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actual notice of the conveyance to Charles at that time, but it would seem strange, indeed, living in the same locality, that she did not learn of it during the succeeding seven or eight years. She certainly must have heard of the conveyances during that time—at least there was no evidence offered that she did not.

The note was permitted to run over four years and was then renewed, Charles again signing the note. It is a significant fact that in both instances it is Charles alone who is financially responsible. He had substantially the same property when the note was renewed that he had when he first signed it, and he was likewise out of debt, and his real estate unincumbered, save by the marital rights of his wife, whom he had recently married. When the note was first signed, when renewed, when due in 1893, George was insolvent and Charles was solvent, being worth three or four times the debt over lawful exemptions. The deed from Charles to his mother was written and completely executed, except the mere delivery, in 1891. Yet, he did not deliver it until more than four years thereafter. Now, if Charles were trustee for his father, as claimed, you, then, have to impute to him the folly of surrendering the means of protecting himself against loss on the note, as well as dishonesty, in wrongfully conveying the property.

Had Charles delivered this deed at any time during the years 1891, 1892 or 1893, would it not have caused comment, or even aroused suspicion? The delivery and recording of the deed as late as April, 1895, did not have that effect. A judgment against Charles in 1895 would have been good. Why did not plaintiff act then? She deferred action for nearly one and one-half years after Charles conveyed to his mother, but commenced suit two days after the assignment.

The plaintiff has been unfortunate. She permitted the defendants, George and Charles, to retain her money for more than eight years, relying, doubtless, on the solvency of Charles. She permitted these several conveyances to be made without any inquiry as to the reasons therefor, and without making any effort to collect her claim. These considerations induce the belief that Mrs. Hedrick relied upon Charles for the payment of her note, having full faith and belief, no doubt, in his solvency and perfect integrity; and considerations of common honor and manhood should prompt these men to make unusual effort to repay this confiding old woman; but, however, that may be, the evidence does not warrant the court in granting the relief prayed for in the petition and cross-petition, and they, therefore, will be dismissed at the cost of the plaintiff.

The appeal bond is fixed in the sum of two hundred dollars.

An entry in accordance with the foregoing opinion may be placed upon the journal of the present term.

Frazier & Hicks, for plaintiff.

Nichols & Nichols and *W. W. Prather*, for defendants.

Railway Co. v. Wilkin.

SECURITY FOR COSTS—JUDGMENTS.

[Franklin Common Pleas, 1900.]

COLUMBUS CENTRAL RAILWAY CO. v. WILKIN.**1. ORDER REQUIRING SECURITY FOR COSTS NOT A JUDGMENT.**

An order requiring a plaintiff to give security for costs by depositing a fixed sum of money by a day named and in case of default the action to stand dismissed, is not a judgment, but an order (sec. 5310, Rev. Stat.,) upon which, in case of non-compliance, judgment of dismissal may be predicated. Such order does not, however, upon failure to make the deposit within the time, of itself terminate the action. The court may open the default and order *de novo*.

2. ORDER DOES NOT DEPRIVE RIGHT TO GIVE SECURITY BY INDORSING.

An order requiring plaintiff to give security for costs by depositing a fixed sum by a day named, does not deprive plaintiff of the right to secure the costs by procuring a qualified surety to indorse the summons or the petition; and if this is done within the time limited in the entry for making the deposit, it amounts to a substantial compliance with the order.

EVANS, J.

This court, at its January term, 1900, to-wit, March 20, upon motion of defendant, required plaintiff, an insolvent corporation, to give security for costs, on or before the first day of the present term, to-wit, April 9. Plaintiff elected to deposit money, and thereupon the court ordered that plaintiff within the time above mentioned, deposit with the clerk the sum of \$100, "and in default thereof, that this case stand dismissed." The deposit has not been made, and defendant now insists that this action has been dismissed and is no longer pending, by reason of said entry made at the last former term of this court. The plaintiff is here ready and willing to secure the costs, but the question first to be determined is whether the action is pending. If said order is a final judgment, the case is out of court.

The order is not a final judgment, for the reason that it is conditional. By its terms the action is to stand dismissed if plaintiff does not, within the time limited, deposit \$100.00 with the clerk.

It appears that plaintiff attempted to comply with the order within the time limited, and provided a person to sign an instrument binding him as surety for costs, but this instrument has not been approved by the clerk for some reason not known to the court. Possibly for the reason that by the terms of the order the plaintiff was directed to deposit with the clerk the sum of \$100; and defendant's counsel insist that plaintiff, under the order, could secure the costs only in the manner therein directed. Section 5340, Rev. Stat., provides two modes of securing the costs. By one of these modes the surety may indorse the summons, or sign his name on the petition, as surety for costs, or the plaintiff may deposit with the clerk such sum of money, as security for costs as in the opinion of the clerk, will be sufficient for the purpose. The

order to deposit a sum of money, the amount whereof is fixed by the court, or the clerk, does not deprive plaintiff of the right to have a surety endorse his name on the summons, or petition, as surety for costs. The object of the order is to fix the amount, of money to be deposited, if the costs are secured by that mode, and is not to exclude the plaintiff of the right to secure the costs by either mode.

If the plaintiff procured a qualified person to endorse the summons or petition as surety for costs, he should have been approved by the clerk. This would have been a substantial compliance with the order to secure the costs.

A judgment is the final determination of the rights of the parties in action, and a direction of the court, or judge, made or entered in writing and not included in a judgment, is an order. Section 5310, Rev. Stat. A judgment must be definite. It is the certain and final conclusion of the court upon ascertained premises, and must therefore be unconditional. An application for a judgment is always necessary in case of default, and as a condition precedent to the judgment the court must judicially determine that a party is in default.

By the terms of said entry of March 20, the court ordered that plaintiff, within the time named, deposit with the clerk the sum of \$100, and in default thereof, that this case stand dismissed. Is the plaintiff in default? A substantial compliance with the order is all that was necessary. If the plaintiff substantially complied with the order by procuring a proper surety to indorse as surety for costs, and nothing remained to be done except the approval of such surety by the clerk, the action ought not to be dismissed on the ground that the order was not literally complied with by making a deposit in money.

Under our code, there is no distinction between a judgment and a final judgment, for "a judgment is the final determination of the rights of the parties in action" (Sec. 5310, Rev. Stat.) The said entry is not a judgment, but an order, and non-compliance therewith may be the predicate of a judgment, or the court may open the default and order *de novo*.

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INSURANCE COMPANIES—TAXATION.

[Medina Common Pleas, 1900.]

OHIO FARMERS INSURANCE CO. V. ELBRIDGE G. HARD, TR.

1. PROCEEDINGS TO CORRECT RETURNS.

A person whose returns of personal property for taxation the county auditor has reason to believe are false and against whom he is proceeding under sec. 2281-2, Rev. Stat., is not required to appear before the auditor, in response to the notice giving him an opportunity to be heard, but if such person fails to appear, the auditor may proceed in his absence to ascertain from the best evidence available the true amount of property which such party should have listed and have same entered on the duplicate for collection.

2. ASSETS OF INSURANCE COMPANIES OUTSIDE THE STATE TAXABLE.

An Ohio mutual insurance company, also doing business in other states, should under sec. 2744, Rev. Stat., list for taxation in Ohio not only its property within the state, but also its assets, whether in the form of notes or cash balances, in the hands of agents in other states. The fact that such company, in order to do business in other states, may be subjected to a franchise tax or a tax for permission to do business in a state, does not constitute double taxation or relieve the company from taxation of such assets or personal property in Ohio.

3. RETURNS GROSSLY CARELESS—FALSE WITHIN THE STATUTE.

The fact that the sworn annual reports of a mutual insurance company to the state commissioner of insurance place the assets of the company at a much higher valuation than the sum at which they were returned for taxation, the two reports being made by the same officers, who had complete and accurate sources of information, is proof that the company was aware of the true value of its assets, and indicates, *prima facie*, a purpose to evade or escape taxation; such returns, for these reasons and in view of the knowledge, as to property taxable in Ohio, required upon the part of those making returns for taxation, are so grossly careless as to be false within the meaning of the statute as defined in Ratterman v. Ingalls, 48 Ohio St., 468.

4. COURT HAS AUTHORITY TO REMIT PENALTY ON EQUITABLE GROUNDS.

Where an insurance company, in explanation of and to justify its returns of personal property at much less than its full value, claimed that it was the rule in the county and generally in the state to tax personal property at about sixty per cent. of its true value, the court held, that while the constitution and laws of the state require all property to be taxed at its true value in money, notice might be taken of the rule in question; and that where the return, if it were permissible to return such property at sixty per cent. of its value, would be a fair one, the court has power to remit the penalty and permit the company to pay simple taxes on the amount of property which it failed to return.

KOHLER, J.

The original petition in this case was filed April 5, 1892, and an amended petition was filed December 10, 1892. The case was submitted to the court upon the amended petition, the answer of the defendant, supplementary answer and cross-petition (filed January 16, 1899), the reply and the testimony.

As the pleadings are somewhat voluminous a general statement of the nature of the action and of the questions presented will be sufficient.

The plaintiff, the Ohio Farmers Insurance Company, is a corporation organized under an act of the general assembly of this state, passed

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February 8, 1848, located in Westfield township, in Medina county. It is engaged in the business of fire insurance, and was organized for that purpose; and since that time this company has been engaged in such business quite extensively, not only in the state of Ohio, but a number of other states as well. The general office of the company is in Westfield township, Medina county.

The amended petition sets forth that the real estate of the company and all the monies, credits and movable property added thereto were fully listed for taxation as required by sec. 2744, Rev. Stat., and the return thereof made to the auditor of the county for the years 1886, 1887, 1889, 1890 and 1891; that in the year 1886 the property was valued for taxation at \$880,864.00, for the year 1887 at \$930,861.00, for the year 1888 at \$932,186.67, for the year 1889 at \$1,010,171.08, for the year 1890 at \$1,066,444.92, and for the year 1891 at \$1,118,198.30; that the valuation so fixed for said years was the fair and full valuation of said property, and that the taxes for each of said years were duly assessed thereon for state, county, township and school purposes, which the plaintiff has fully paid for each and all of said years. Complaint is made that notwithstanding the premises the auditor of the county of Medina, on or about April 9, 1892, certified to the defendant, as treasurer of said county, that he had entered upon the tax list in his office against the plaintiff, personal property, monies, credits and investments for taxation in the years aforesaid, in amounts additional to what had been returned by said company, with the penalty and taxes thereon, as follows:

For the year 1886	\$938,972 00
" 1887	1,005,111 00
" 1888	1,136,866 00
" 1889	1,151,779 00
" 1890	1,235,468 00
" 1891	524,818 00

That the taxes on the same were added as follows:

For the year 1886	\$9,957 51
" 1887	10,252 18
" 1888	10,913 91
" 1889	10,287 43
" 1890	12,848 86
" 1891	5,610 20

Making a total of added taxes.....\$60,490 04

It is alleged that the action of the auditor in so certifying said amounts for taxation was unauthorized; there was no foundation therefore in fact; it was not in pursuance of the requirements of any statute in ascertaining and certifying to the defendant the additional amount of

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taxes so charged, and that the auditor acted wholly without jurisdiction in the premises.

It is claimed by the plaintiff that its property, and all of it, was fairly and fully listed for taxation according to its average value, and the same as other property was listed for taxation during said years by the owners of property in Medina county.

The company sets forth that the returns so made by it were not false; that there was no evasion by it at any time in the matter of making a due return of all its property for taxation at its fair value, and that it has in all respects complied with the requirements of the statute in respect to the amount and the value thereof.

The complaint is that the treasurer is about to collect the said taxes so assessed against the company by the auditor as well as the statutory penalty of fifty per centum thereon, all of which, it is averred, is illegal and contrary to justice and equity, being an unjust discrimination against the plaintiff and subjecting it to taxation greatly beyond the amounts required to be paid by other persons, and the prayer of the petition is for an injunction to restrain the collection of said sum, \$60,490.04, or any part thereof.

The answer filed by the defendant, as treasurer, avers that on or about the first of April, 1892, A. L. Corman, being then the auditor of Medina county, having reason to believe and did believe that the defendant had made false returns of its taxable personal property to the auditor of said county for each of the years hereinbefore specified, served a notice upon the plaintiff to that effect, and that thereupon one of plaintiff's directors and the general manager appeared before the auditor on April 7, 1892, and asked to have the hearing of the matters continued to April 9, 1892, which was granted upon said application; and that upon April 9, 1892, plaintiff was given an opportunity to show that its returns of taxable property to the auditor of said county for each of said years were correct, but the plaintiff did not appear, and failed to show that its returns for any one of said years were correct; and that thereupon the auditor, as was his legal duty under secs. 2781 and 2782, Rev. Stat., proceeded to and did correct said returns upon satisfactory and competent evidence, and from said evidence found that the returns made by said company of its property for each one of said years were false, and that he thereupon found the true amount for each one of said years that the plaintiff should have returned as and for its true return of taxable personal property, and that to that sum he added the statutory penalty of fifty per centum, and deducted therefrom the sum each year actually returned, and assessed taxes upon the difference and placed the same upon the tax list in his office and upon the proper duplicate, and certified the same to the treasurer of the county for collection as other taxes.

The answer denies that the plaintiff's returns as made by its officers for any one of the years enumerated were correct, but avers that they

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were false, and were so made for the purpose of evading the payment of its fair and just share of taxes.

It is claimed by the defendant that the amount returned by the officers of the plaintiff company did not exceed from fifty to sixty-six per centum of its credits, monies and investments in stocks and bonds.

It is claimed by the defendant that in 1886, the plaintiff had and owned \$1,213,234.82 taxable personal property, to which the auditor added fifty per cent., making the sum of \$1,819,336.00, and deducting therefrom the returns made by the plaintiff, to-wit, \$880,864.00, which left a balance for that year of \$98,972.00, and in like manner said auditor made his finding for each one of said years.

The term of office of Elbridge G. Hard expired since this suit was commenced, and James Newton succeeded him in office, and has filed his supplemental answer setting up this fact, which the reply admits.

A large amount of documentary evidence was submitted to the court upon the hearing in connection with the oral testimony of a number of witnesses touching the depreciation of real estate and the general value of real estate mortgages during the years covered by this inquiry, and also as to the manner of valuation of personal property for taxation in Medina county and some adjoining counties during the same time. The question was also very fully argued by counsel, both orally and upon briefs submitted to the court.

And the question, therefore, presented is, shall the sum which the auditor of the county has so certified to the treasurer for taxation, stand and be collected, or shall the court modify or entirely annul the action of the auditor in the premises? And this raises a number of questions both of law and of fact which have been very fully and very ably presented to the court by the learned counsel in the case.

Perhaps the first question to be determined by the court, upon the evidence in the case, relates to the finding of the auditor in the matter of the correction of these tax returns for the years mentioned, and this is primarily a question of fact. Did the company omit assets or property that should have been included, or did it undervalue the property that was listed?

And another question arises in the case, which is quite important, which relates to the method of computing the amounts to be added by way of penalty, the penalty being fifty per centum.

It is claimed by the plaintiff company that the penalty of fifty per centum should be based entirely upon the amount omitted by the return, whereas the auditor took the amount of the return as he found it should have been made, and upon that sum added the penalty of fifty per centum, and deducted from this gross amount the amount returned, so that it is claimed by this method the plaintiff would be required to pay a penalty not only upon the amount which it failed to return, but also

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upon the amount which it did return, which it is claimed would be oppressive and inequitable. This presents a legal question.

Again, it is claimed before any penalty can be annexed by the auditor it must be ascertained and found by him upon evidence that the return made by the company was false; not merely that it was an erroneous account, either in the amount of property or in the valuation thereof, but that it was false and made for the purpose of escaping taxation.

It is claimed in this connection that allowing the auditor's correction to stand as to the amount and value of property as shown by the corrected lists, the amount of tax added, including penalty of fifty per centum on omitted property, would be \$36,357.90, instead of \$60,490.04, which includes a penalty of fifty per centum on property that had been listed for taxation and was not omitted. So this raises a question of law as to the true intent and meaning of sec. 2781, Rev. Stat., under which these corrections and additions were made.

Another question presented relates also to the auditor's finding in regard to the assets of the company—property, it is claimed, such as goods, credits and balances in the hands of agents in other states, and upon business done in other states. It is claimed that the auditor had no right in making his findings or in his corrections to include assets, notes, credits, monies, etc., of that description, the claim being that during the same years the company was doing business and had agencies throughout Indiana, Michigan and Illinois and other states, and that in the prosecution of the business, notes of farmers were sometimes taken for premiums upon insurance policies, these notes running variously from sixty days to six months; these notes were collected at these agencies and the money remitted to the company; and that perhaps, the correct amount of business of that description, within and without the state, was from \$202,000.00 in 1886 to \$234,000.00 in 1891.

In fine, it is claimed that the auditor's statement includes not only its assets in the way of credits at its agencies in Ohio, but also in all of the other states in which it was doing business at that time, and this, it is asserted and argued, he had no right to do.

Dependence is placed upon sec. 2744, Rev. Stat., and it is claimed that the plaintiff is one of those corporations whose return for taxation is governed by that section, which requires the listing of all their personal property, monies and credits within the state, and that under this language the plaintiff was only required to list its monies and credits at such agencies as are within the state.

Another question presented and argued by counsel relates to the proper valuation for taxation of the property that admittedly should have been listed here for taxation. It is claimed that the auditor listed this property at its face value, whereas it should have been listed at its true value in money. A large amount of the assets of the company is evidenced by notes and mortgages upon farm lands and property, indeed

its assets are chiefly of that description, and it is claimed that although these loans were secured by mortgages, that in valuing them and listing them for taxation the officers of the company were warranted in taking into account the depreciation in the value of farming lands during the current years, as affecting the market value of the securities so held by the company; and it is claimed on the average amount of such mortgages the depreciation in the value of farm lands so pledged for the payment of loans caused a shrinkage of fully twenty-five per centum in the value of such mortgage securities. It is claimed also that the auditor's statement in regard to the bills receivable, covering balances in the hands of agents, is excessive, and it is claimed that such balances are liable to shrinkage, from various causes, of fully thirty per centum of their face value, and that a deduction should be made from the auditor's statement for the amount of such shrinkage.

Another question arises in the case upon the testimony offered and upon the arguments of counsel touching the rule or custom of listing property. It is claimed on the one hand that in Medina county, and other counties, it has become a fixed rule and practice in the listing of personal property to value it at from sixty to sixty-six per centum of its true value in money. It is claimed that that is the rule as to real estate; and bank stocks are not listed at more than 66 2-3 per cent; and that the owners of notes and mortgages and other credits, in accordance with a general practice or custom, list intangible property of that description at from sixty to sixty-six per centum of its true value in money, and even less.

On the other hand such custom is denied, and it is claimed that the statute fixes the rule, and that there is no legal warrant or excuse whatever for listing property at less than its true value in money; that the fact that one person has so listed, or that certain banks, or all banks, are so listing their property, is no excuse whatever. The law furnishes the rule, and any custom in that respect, or any rule established by any board of revision or equalization fixing a rule contrary to the rule of the statute, is void and constitutes no excuse for listing property at less than its true value in money.

The point is also made that unless the auditor found that the returns for the five years from 1886 to 1891 were false, as the language of that section has been construed by the courts, then he had no jurisdiction whatever to proceed in the premises, and no right or power to make corrections, or place upon the duplicate property omitted or undervalued, unless it is found that the returns were in fact false.

There are a number of other questions, perhaps, incidentally that have been argued in the case, but the above presents the principal questions.

These questions I will endeavor to consider and determine about in the order in which I have stated them.

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The jurisdiction of the court of common pleas to review the action and proceeding of the auditor is conferred by sec. 5848, Rev. Stat. "The court may enjoin the whole tax, or part of it, or remit the penalty, as the facts and the justice of the case require. The suits afford every remedy a citizen can require, consistently with the interests of the state, which cannot be delayed in the collection of its revenue without more or less embarrassment to all the public interests." Musser v. Adair, 55 Ohio St., 466.

It appears that the auditor, before taking any steps in the premises, notified the officers of the Ohio Farmers Insurance Company of his belief that the property of the company had not been fully and fairly returned for taxation, and set a time for the hearing of the case before him and such explanations as the officers of the company might see fit to make at that time. It appears also that one of the directors or officers of the company, pursuant to such notice, appeared before the auditor and requested a postponement until a subsequent day for such hearing, which was granted, but upon the adjourned day and at the time and place fixed the company failed to appear, and, no officer or agent appearing in its behalf, the auditor thereupon proceeded to examine the evidence which had been submitted to him, touching the alleged failure of the company to make due and full returns of its property and assets for the five years preceding, and also for the current year. Doubtless the company was not obliged to appear before the auditor and make defense; it could let the case go by default if it saw fit so to do, and no good reason has been presented to the court to account for the failure of the company to appear before the auditor at the time mutually agreed upon and submit the evidence and make the explanation which has been submitted to the court in this case. It was a question of taxation, with which the auditor of the county, from the very nature of his duties, was quite familiar, and as he was acting under an oath of office, as well as under the sanction of official duty, an honest purpose in the discharge of his official duties is to be presumed.

The proceeding before the auditor was had under sec. 2781, as amended April 14, 1886, and which was in force at the time when the auditor made his correction, and 2882, which sections read as follows:

"Section 2781. If any person whose duty it is to list property or make a return thereof for taxation, either to the assessor or county auditor, shall, in any year or years make a false return or statement, or shall evade making a return or statement, the county auditor shall, for each year, ascertain, as near as practicable, the true amount of personal property, monies, credits, and investments that such person ought to have returned or listed, for not exceeding the five years next prior to the year in which the inquiries and corrections provided for in this and the next section are made; and to the amount so ascertained as omitted for each year, he shall add fifty per centum, multiply the omitted sum or

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sums, and [as] increased by said penalty by the rate of taxation belonging to said year or years, and accordingly enter the same on the tax lists in his office, giving a certificate therefor to the county treasurer, who shall collect the same as other taxes."

"Section 2782. The county auditor, if he shall have reason to believe, or be informed that any person has given to the assessor a false statement of the personal property, monies, or credits, investments in bonds, stocks, joint-stock companies, or otherwise, or that the assessor has not returned the full amount required to be listed in his ward or township, or has omitted or made an erroneous return of any property, moneys, or credits, investments in bonds, stocks, joint-stock companies, or otherwise, which are by law subject to taxation, shall proceed, at any time before the final settlement with the county treasurer to correct the return of the assessor, and to charge such persons on the duplicate with the proper amount of taxes; to enable him to do which, he is hereby authorized and empowered to issue compulsory process, and require the attendance of any person or persons whom he may suppose to have a knowledge of the articles, or value of the personal property, moneys, or credits, investments in bonds, stocks, joint-stock companies, or otherwise, and examine such person or persons, on oath, in relation to such statement or return; and it shall be the duty of the auditor, in all such cases, to notify every such person, before making the entry on the tax list and duplicate, that he may have an opportunity of showing that his statement or return of the assessor was correct; and the county auditor shall, in all such cases, file in his office a statement of the facts or evidence upon which he made such correction; but he shall, in no case, reduce the amount returned by the assessor, without the written assent of the auditor of state, given on a statement of facts submitted by the county auditor. In all cases in which any person shall make a false statement of the amount of property for taxation, to evade the payment of taxes in whole or in part, the person making such false statement shall be liable for, and pay all costs and expenses that may be incurred under the provisions of this section, and the same fees and costs shall be allowed and paid as are now or may be allowed by law, for similar services, and if not paid, may be collected before any justice of the peace of the proper county, by suit in the name of the county commissioners, but in all cases under this section, where the statement shall be found correct, and no intention to evade the payment of taxes, the costs and expenses incurred under this section shall be paid out of the county treasury of the proper county, on the order of the county auditor."

"The auditor of a county, under secs 2781 and 2782, Rev. Stat., does not act as a judge. He is required to inquire and may take evidence to inform his mind and must use his best judgment in the matter, but in all this he does not act judicially within the meaning of the constitution.
* * * He acts simply as an agent of the state in the valuation and

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assessment of property of its citizens for the purpose of taxation. He is simply a ministerial officer and none other. His proceedings under these sections make a *prima facie* case for the collection of the tax based on the additions." By Judge Minshall, in *Musser v. Adair*, 55 Ohio St., 466.

The auditor of Medina county, therefore, did at the time stated, and after due notice to the company, proceed to inquire as to the returns made for taxation by the Ohio Farmers Insurance Company for the years mentioned. He had before him the annual reports made by the company to the superintendent of insurance, pursuant to sec. 3654, Rev. Stat., which, so far as it is necessary in this case to refer to, reads as follows :

"The president or vice-president and secretary of such (each) insurance company organized under any law of this or any other state, and doing business in this state, shall, annually, on the first day of January, or within thirty days thereafter, prepare under oath, and deposit in the office of the superintendent of insurance a statement of the condition of such company on the 81st day of December, then next preceding, exhibiting the following facts and items and in the following form, namely:"

And the report filed by the company with the superintendent of insurance shows assets as follows :

For the year 1886—

Real estate.....	\$ 18,000 00
Loans on mortgages.....	738,346 38
Interest due on mortgages.....	1,510 00
Interest accrued on mortgages.....	40,566 98
U. S. regular 4 per cent. bonds.....	31,750 00
Municipal bonds.....	92,697 68
Loans on collaterals.....	19,500 00
Cash on hand and in banks.....	183,622 10
Interest due on stocks.....	2,266 08
Bills receivable taken for fire risks, not matured.....	219,138 86
Rents due, etc.....	4,081 00
	<hr/>
	\$1,351,479 89
Deduct real estate.....	\$ 18,000 00
Deduct U. S. bonds.....	81,750 00
	<hr/>
Balance taxable assets.....	\$1,301,729 89

For the year 1887—

Real estate.....	\$ 20,828 95
Loans on mortgages.....	781,161 62
Interest due on mortgages.....	4,090 28
Municipal bonds.....	84,409 97
Collateral securities.....	38,000 00

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Cash deposited in banks.....	201,658	51
Cash in company's office.....	8,977	28
Interest due on bonds, etc.....	2,960	75
Interest on collateral loans.....	2,047	98
Bills receivable taken for fire risks, not matured.....	251,567	20
	<u>\$1,415,197</u>	<u>54</u>
Deduct real estate.....	20,928	95
Balance taxable assets.....	<u>\$1,394,868</u>	<u>59</u>

For the year 1888—

Real estate.....	\$ 21,626	71
Loans on mortgages	906,905	64
Interest on mortgages.....	52,826	03
Municipal bonds.....	183,002	57
Collateral loans.....	28,500	00
Cash in office and bank.....	137,992	39
Interest accrued on bonds.....	2,912	31
Interest on collateral notes.....	1,243	47
Bills receivable for fire risks not matured.....	191,817	02
	<u>\$1,476,827</u>	<u>14</u>
Deduct real estate.....	21,626	71
Balance taxable assets.....	<u>\$1,454,700</u>	<u>43</u>

For the year 1889—

Real estate.....	\$ 22,089	37
Mortgage loans.....	894,247	40
Municipal bonds.....	113,736	23
Collateral loans.....	28,920	00
Cash on hand and in banks	224,486	22
Interest on bonds.....	2,562	22
Interest on collateral loans.....	1,250	71
Bills receivable taken for fire risks, not matured.....	220,152	16
	<u>\$1,561,008</u>	<u>61</u>
Deduct real estate.....	22,089	37
Balance taxable assets	<u>\$1,538,919</u>	<u>24</u>

For the year 1890—

Real estate.....	\$ 22,089	37
Mortgage loans.....	928,002	16
Interest on mortgages.....	54,052	65
Municipal bonds.....	104,366	05

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Collateral loans.....	16,920 00
Cash in office.....	15,462 09
Cash in bank.....	276,297 11
Interest on bonds.....	1,925 95
Interest on collateral loans.....	829 00
Bills receivable for fire risks, not matured.....	234,275 66
	<hr/>
	\$1,654,280 64
Deduct real estate.....	22,089 37
	<hr/>
Balance taxable assets.....	\$1,632,141 27

For the year 1891—

Real estate.....	\$ 71,800 00
Mortgage loans.....	919,490 99
Interest on mortgages.....	50,627 52
Municipal bonds.....	200,067 24
Collateral loans.....	14,120 00
Cash in office and banks.....	330,897 73
Interest on bonds.....	4,476 48
Interest on collateral loans.....	1,062 58
Gross premiums not more than three months due.....	180,454 38
All other property	1,800 00
	<hr/>
	\$1,774,796 67
Deduct real estate.....	71,800 00
	<hr/>
Balance taxable securities.....	\$1,702,996 67

While the property returned for taxation by the company to the auditor was as follows :

For the year 1886.....	\$ 880,864 00
" 1887.....	930,861 00
" 1888.....	932,186 67
" 1889.....	1,010,171 08
" 1890.....	1,066,444 92
" 1891.....	1,118,198 30

Finding these differences for each of these years, and upon this and other evidence, the auditor proceeded to and did correct the returns by increasing the valuation to what he believed to be the true value in money of the taxable assets of the company. These reports of the company to the superintendent of insurance were made on the thirty-first of December in each year, while the returns for taxation were made on the Saturday before the second Monday of April in each year, so that

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in each year he added the estimated increase between the thirty-first of December and the second Monday in April for each year as follows:

For the year 1886.....	\$ 20,000 00
" 1887.....	25,000 00
" 1888.....	16,000 00
" 1889.....	24,000 00
" 1890.....	25,000 00
" 1891.....	80,000 00

Having thus arrived at the true amount of the money value of the assets of the company as he believed, he added to the amount thus found the fifty per cent. penalty provided for by sec. 2781, except for the current year of 1891, and from this gross amount he deducted the amount which the company actually returned for taxation in each year, and then multiplied the difference by the rate of taxation. The total amount of unpaid taxes so found was \$60,490.04. It was to enjoin perpetually the collection of this tax that this suit was brought.

The first question, therefore, to be determined by this court, under the issues joined by the pleadings, is whether these returns made by the company for the years 1886, 1887, 1888, 1889, 1890 and 1891, or any of them, were false returns within the meaning of sec. 2781, as construed in *Ratterman v. Ingalls*, 48 Ohio St., 468. If they were not false returns, as the term is construed by the Supreme Court, but were still incorrect, has the auditor the right under sec. 2781 or sec. 2782, to correct the duplicate, adding simply taxes without penalty back of the current year? If the auditor, from the evidence before him, finds no false return, no evasion in making returns, and no wilful undervaluation of personal property, that ends the case. If, however, he finds any one of the above three grounds he may correct the duplicate under these two secs. 2781 and 2782, and issue his certificate, placing the amount of his finding on the grand duplicate under the last clause of sec. 2753.

In *Ratterman v. Ingalls*, *supra*, the Supreme Court had these sections of the Revised Statutes under consideration and determined the meaning of the language, to-wit, "a false return," as follows: "In order to render a return made by a taxpayer to the assessor of property for taxation a 'false return' within the meaning of original and amended secs. 2781, Rev. Stat., there must appear, if not a design to mislead or deceive on the part of the taxpayer, at least culpable negligence." Culpable negligence is sufficient though there may be no design to mislead or deceive to make a return false. And Judge Spear, in the above case, page 489, uses this language: "It is the duty of the resident property owner to return his taxable property for taxation. In the performance of this duty he must use diligence and care in acquiring knowledge from sources where information is obtainable. If he uses such care and acts honestly, making his return in accordance with his best knowledge and

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belief after using all reasonable means to obtain an intelligent belief, his return will not be false within the meaning of sec. 2781, but this belief must result from a careful effort to perform the duty. A blind reliance upon an indolent belief that one's property is not taxable, without investigation, inquiry or disclosure to the taxing officer, would show culpable negligence as fatal to the claim of good faith and innocent purpose as would a direct intent to deceive."

Now, what are the facts disclosed by the evidence in this case?

The Ohio Farmers' Insurance Company was incorporated in 1848, and has been doing a large and prosperous business ever since that time; that its officers are men of prudence, foresight and sound judgment is shown by the present standing of the company, and its constantly increasing prosperity during the years it has been in existence. Its business is not confined to the state of Ohio, but it extends its operations into adjoining states, Indiana, Illinois, Michigan, Missouri and several western states, where it has a large number of agencies through which it carries on its insurance business. It is under state supervision and control. It is to be presumed that the officers and directors of this company have at all times an accurate knowledge of its business transactions, so that its financial standing and the condition and value of its assets are accurately known to those having its business in personal charge. Its business must be conducted by a system of accounts as precise and accurate in all respects as the business of a banking institution or of any large corporation, so that in the matter of making returns to the county auditor for taxation there would seem to be very little left for mere conjecture or estimate as to the true value in money of the property and assets of such corporation. The officers of the company have complete sources of information readily at hand, and taking, therefore, these two reports made by the same officers for the same years, one to the superintendent of insurance, made pursuant to law; and the other made to the auditor of the county for taxation, also pursuant to law, the difference between the amounts so shown is so great as *prima facie* to indicate a purpose to evade or escape taxation upon a large amount of property.

It is claimed, however, in explanation of this difference in these two reports, that the report made to the superintendent of insurance showing the condition and property of the company, covers assets in other states, to-wit, money in the hands of agents, and perhaps, loans in other states, while the company was only required to return for taxation its property and assets within this state. And again it is claimed that the returns made, or reports made to the superintendent of insurance, show the exact par value of all the assets and property of the company, whereas, by universal practice, or general custom and practice, it is claimed that the property is not returned at such valuation, but at the rate of fifty to sixty-six per centum of its valuation; and that, therefore, taking into

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consideration simply the property taxable in this state, and excluding from it property held and owned by the company in other states, and returning it or estimating it at the same rate by which other property in Medina county is returned, that the company has fully complied with its duty in this respect under the law, and that the returns were, therefore, not only not falsely, carelessly nor negligently made, but were entirely correct.

It is claimed that sec. 2744, Rev. Stat., applies; that it is one of those corporations whose return for taxation is governed by that section, which only requires the listing of all their personal property, moneys and credits within the state; and that, therefore, the officers of this company, in making the return to the auditor of taxable assets, were warranted in excluding from the return all assets or property not within the state; that it was only required to list its credits and moneys within the state, and at such of its agencies as are within the state.

Now, upon this point, while there is evidence presented to the court showing that the company was carrying on business in states other than the state of Ohio, to-wit, in the states already mentioned, no evidence whatever was introduced to the court to show what that business was, how much it was, or how much there was in the hands of the agencies in other states, or the character of the assets. Upon this point very much was left by the testimony to mere conjecture and estimate without any basis whatever for anything like an accurate calculation.

I think it is not tenable that moneys and credits in the hands of agents in states other than Ohio and owned by the company, are not taxable in Ohio. The company, in the prosecution of its business, issues its policy through its agents; these agents, wherever they are in the state or out of it collect the premiums, perhaps cash is paid, possibly in some instances notes are taken; the agents collect the notes and in due time, under such rules as the company prescribes, these credits are returned to the company in Ohio and to its general office in Medina county. My judgment is that such assets, whether in the form of notes for premiums, or cash balances in the hands of agents, are assets taxable in the state of Ohio.

It is true that this company, in order to do business in other states, may be subjected by the laws of those states to a franchise tax or a tax for permission to do business in the state, but that act alone does not constitute double taxation, nor does it, in the judgment of the court, relieve the plaintiff from the obligation to return all such property at its true value in money for taxation in the state of Ohio.

As stated in Cooley on Taxation, page 372, "The general rule that personality is to be assessed to the owner where he has his domicile has been mentioned. This rule is applicable to assets and other chooses in action though the debtor reside out of the state, and although they are secured by mortgage on lands out of the state, and it applies to shares

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held in foreign corporations." It is doubtless true; especially in modern times, in view of the great increase in amount and variety of personal property not immediately connected with the person of the owner, that for the purposes of taxation it may be separated from its owner and may be taxed on its account at the place where it is, although not the place of his domicile, and even though he is not a citizen or resident of the state which imposes the tax. The general rule, however, is expressed in the maxim *mobilia sequuntur personam*, by which personal property was regarded as subject to the law of the domicile of the owner. I think this is the rule in the state of Ohio; that is, that intangible personal property, choses in action, moneys and credits, have no *situs* apart from the domicile of the owner. A resident of Ohio investing money in the states of Indiana, Illinois, or any other state, holding notes therefor, which are secured by mortgage in other states, cannot shield himself from taxation for such property even though the note is made payable in another state and is there paid. Many of our large industrial corporations extend their business into many if not all of the states of this union, and perhaps even farther. They are obliged to extend credit, they take notes or hold accounts, and this business is often transacted in other states by the hands of agents who collect these choses in action and remit the money to the principal office and place of business in this state. Such personal property is clearly taxable in this state, where the owner or owners have their domicile, and not in the states where the debtor lives, or where the notes may be payable.

The case of *Grant v. Jones*, 39 Ohio St., 506, is in point. In that case a non-resident of the state, in fact having no residence anywhere, who is a peddler traveling from state to state, but for fifteen or twenty years had been doing business in this state, loaning money and taking mortgages upon property in this state, and the auditor of Butler county brought suit against him for more than \$2,000 for taxes assessed against him in one township of that county for the years 1874, 1875, 1876, 1877 and 1878, but Judge Johnson, announcing the opinion of the court, held they were not taxable there, for the reason that the owner was not a resident of the state, and that these choses in action had no *situs* apart from the domicile of the owner.

To the same effect is *Myers v. Seaberger*, 45 Ohio St., 232. "A loan of money secured by mortgage on real estate is a credit within the meaning of the statutes of this state, providing for the taxation of property; and, where the creditor resides in another state, is not subject to taxation in this, although the securities are in the hands of an agent residing here, entrusted by the terms of his agency, with the collection of the interest and principal when due, and its transmission to the creditor when collected."

Hilliard in his work on the law of taxation, page 182, says, "Debts and choses in action, being a species of intangible property, are deemed,

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for purposes of taxation, to be situated at the domicile of the owner. These choses in action are properly assessed in the county where the owner resides; so money loaned by one in a certain city and made payable there, cannot be taxed as personal property, he not being a resident either of the city or of the state."

In *Lee v. Dawson*, Tr. (the fifth circuit of this state), 4 Circ. Dec., 442, the syllabus is as follows: "Owners of intangible property, residents of Ohio, must list the same for taxation, even though the same is under the control and management of a non-resident agent for investment and collection." In this case, decided by Judge Jenner, the court says, "Investigation and correction by the auditor is to be governed by section 2781, as amended April 24, 1893," and in deciding this case the learned judge also gives the rule as to the valuation of property or funds for taxation, as follows: "The rule, as we understand it," says the court, "and as provided by sec. 2739, that we must determine what the fair value of the property is that should be listed or taxed.

"That there are some inequitable things connected with the system of listing property in Ohio, is apparent to counsel and to everybody; but here is the statute, and we recognize the rule of value to be as we have stated it. Take bank stock for example, it may be worth 100 cents on the dollar, yet it is never returned at 100 cents on the dollar, on the contrary the average is from 60 to 70 per cent. This is so, perhaps, without a single exception throughout the state. If it is assessed in one county at 100 cents on the dollar, and in another, or in many counties at 60 cents, then there is an inequality, and it is inequitable and unfair."

In this case the securities were valued by the court at 100 cents on the dollar, not including interest.

That the company pays a franchise tax in other states for permission to do business therein does not excuse the company from returning for taxation such property in this state, where the company is located.

On this point it is the opinion of the court that the company had no right to exclude from its tax returns these intangible assets outside of the state of Ohio, but was bound to return them in connection with the assets in the hands of its Ohio agents. Any other rule than this would introduce the greatest confusion in the taxation of intangible property, and would open a wide door for fraud and evasion of taxes. As I have stated, the general rule for determining the *situs* of personal property is that it follows the person of the owner and has its *situs* at his residence. A "debt * * * may, for purposes of taxation is * * * situated at the domicile of the creditor," although secured by mortgage on real estate situated in another state. *Kirtland v. Hotchkiss*, 100 U. S., 491.

It is contended, however, that these assets of the company were valued for taxation at their true value in money, the same as other

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property was valued in Medina county, and upon this point there was considerable evidence to show that lands were generally assessed for taxation at about one-half of the selling value thereof. There was some evidence also as to the taxation of shares in national banks, which, according to rule established by the state board of revision, were taxed at about sixty-six per centum of their true value; that other property was taxed much below its true value, not only in Medina county, but in Wayne county and in Lorain county.

The evidence upon this question was very unsatisfactory. Nothing like a general, uniform or established rule upon the question as to the percentage of valuation was given to the court upon the hearing of this case. The witnesses differed. The auditor of Medina county, in his testimony, stated there was no rule upon that subject other than the instructions to the auditor from the auditor of state, and which was that property should be listed for taxation at its true value in money.

I am satisfied, however, not only from the evidence in this case, but from facts that have become so notorious and so universal that the court might, perhaps, take judicial notice of them, that all kinds of property are greatly undervalued for taxation.

Justice Miller of the United States Supreme Court, in *Cummins v. Merchants' National Bank*, 4 Ohio Fed. Dec., 578, declared that it was a matter of common observation that in the valuation of real estate this rule, that is, the valuation at its true value in money, is habitually disregarded, and the same is still more true in regard to the valuation of personal property.

According to the report of the tax commission, appointed by William McKinley as governor of the state, and filed on December 28, 1898, the personal property of the state is not taxed at over from fifteen to twenty per centum of its true value in money, and this notwithstanding the very rigid system in force in this state relating to the taxation of personal assets. I am inclined to believe from all that I can learn that in Summit county, at least containing the manufacturing city of Akron, that the large industrial corporations do not list or pay taxes upon more than ten to fifteen per centum of the true value in money of their personal assets. Indeed, the conclusion of the tax commission, to which I have referred, is that, "It is confidently believed that no appreciable part of the intangible property existing in the city counties is reached by our method of taxation. It is the country counties which pay the taxes upon personal property." See report of tax commission, 1898.

In *Cummins v. Merchants' National Bank*, *supra*, application was made to the court for an injunction to restrain the collection of taxes on bank shares, and it was claimed that these shares were valued at a larger percentage of value than that assessed upon other species of property. In this case the court found from the evidence that the officers charged with the valuation of property adopted a settled rule, or system, by which

real estate was estimated at one-third of its true value, ordinary personal property about the same, and monied capital a six-tenths of its true value. The court found that throughout a large part of the state of Ohio, including Lucas county, the officers charged with the valuation of property for the purposes for taxation adopted a settled rule, or system, in regard to such taxation. But no evidence of any such rule has been disclosed in this case, or of any system or concurrent agreement on the part of the taxing officers. Personal property, other than bank shares and railroad property, is assessed annually by district and ward assessors in the counties and cities, and their assessment is returned to a county or city board of equalization. This assessment includes all personal property, monies, credits and investments of capital, other than those in banks or railroads. Banking and railroad property stands on a different basis, and there is a submission of all of them to a state board of equalization, which finally passes upon the assessment of the counties; and it is doubtless true in respect to bank shares, that the rule established by the state board of revision, composed of the governor, auditor of state and attorney general, is that they are taxed at sixty-six and two-thirds per centum. How such a rule was ever adopted, or upon what authority it stands, I am quite unable to ascertain.

Real estate is not listed for taxation by the owner. He has nothing to do with fixing its value. It is listed by the assessor, and its value fixed by him, and this is subject to revision and equalization by a city or a county board with which the owner has nothing to do. It is otherwise in respect to personal property. There can be no doubt that the fact that real estate lies open to view, that none of it escapes taxation, that it cannot be hidden away, and that personal property, especially intangible personal property, is so difficult to reach and get upon the duplicate, that the assessors and boards of equalization, in consideration of this fact, have placed the valuations of real estate at a figure below its true value in money, perhaps, on an average not above sixty or sixty-six per centum of its true value; but the very fact that real estate is so taxed has induced owners of other species of property, upon the claim of uniform taxation, to put in their property at a reduced valuation, so that at present it frequently happens that the owner of shares in a national bank, on which he receives a dividend semi-annually, and which would regularly bring in the market from \$1.10 to \$1.50, insists upon taxing his shares at the same rate. And one who has \$1,000.00 in money in a bank fully justifies himself in returning his cash at \$600.00 in money; and one who has \$10,000.00 in notes, drawing seven per centum interest, amply secured by mortgage, feels perfectly warranted in returning his credits at \$6,000.00 in value, so that these absurd results follows from a departure from a plain reading of the law requiring property to be taxed at its true value in money.

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Article 12, section 2, of the constitution of the state of Ohio, declares that, "Laws shall be passed, taxing by a uniform rule, all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise; and also all real and personal property, according to its true value in money;" and section 8 provides, "The general assembly shall provide, by law, for taxing the notes and bills discounted or purchased, moneys loaned and all other property, effects, or dues, of every description (without deduction)."

Thus it appears, as far as the constitution is involved, that exact equality of burden is imposed upon all taxable property, whether owned by banks or bankers, or other persons; and further that all property should be taxed according to its true value in money. Judge McIlvaine, *Wagoner v. Loomis*, 37 Ohio St., 571, 579. And Judge McIlvaine, in the same decision, speaking of the inequalities of taxation, uses the following language: "The inequality complained of cannot, in any just sense, be attributed to the state of legislation on the subject. Whether it was wise to adopt different modes and agencies for determining the value of taxable property we need not consider. Much might be said in its favor. But we can, and do affirm, with the utmost confidence, that an honest and intelligent discharge of duty by those intrusted with the execution of the respective modes provided by law, would accomplish all that was intended by the constitution. A faithful execution of the different provisions of the statutes would place upon the duplicate for taxation all the taxable property of the state, whether bank stocks or other personal property or real estate, according to its true value in money; and the equality required by the constitution has no other test. There is nothing in the constitution which requires property to be taxed according to the same per cent. of its true value in money, save only the one hundred per cent. The difficulty, therefore, in this case is not attributable to the laws, but to a failure to execute them in conformity to their true meaning and intent."

Pursuant to the constitutional mandate, the general assembly of the state, by sec. 2744, Rev. Stat., requires corporations generally to list their property for taxation at its actual value in money. And why stock held by an individual in a national bank, upon which dividends are regularly paid of six per cent., and which has a saleable value anywhere from \$1.10 to \$1.50, should be taxed for sixty-six per cent. is more than I can understand.

The language of the constitution is clear and plain, as well as the laws of this state, upon that subject, and I am exceedingly reluctant to recognize any rule, or custom, or practice, in regard to percentage of the true value of such property, my judgment being that the public and private interests will be best subserved and greater equality of taxation secured by enforcing the constitutional rule according to its letter and spirit.

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In this case, however, it is not necessary that I should decide that point. I merely find that the evidence presented in this case presents no rule or custom or practice on the part of the auditor, or of any board touching the taxation of personal property in Medina county at less than its true value in money ; and while it is doubtless true that the Ohio Farmers Insurance Company listed its property for taxation, perhaps, as fairly as other companies, and, indeed, at a much larger percentage of valuation than industrial corporations generally, I still think that its duty was, under the law, to return its taxable assets at their true value in money.

Now, it is claimed that a large amount of the taxable assets of this company consisted of loans secured by mortgages upon real estate in Ohio and elsewhere, and that for a number of years, beginning somewhere along in the '80's, down to the present time, there has been a great depreciation in the value of real property. This is doubtless true. It is one of the results of the business depression through which the country has recently passed, and that this business depression—loss of credit—greatly affected the value of farming property, is well known to all ; and it is urged upon the court that this being the case, the mortgages upon such real estate held by the insurance company were likewise affected, and the value of such securities depreciated in the market.

I think there was evidence offered to the court tending to show depreciation in some cases from twenty-five to forty or fifty per centum of the value of real estate. The Ohio Farmers Insurance Company's loans and mortgages were doubtless taken pursuant to law, and under sec. 3637, Rev. Stat., which section provides that the company may loan its money upon mortgage security, but the security must be upon unincumbered real estate in this state worth fifty per cent. more than the sum loaned, exclusive of buildings. It must be presumed that in loaning money and taking these mortgages that the company was careful to comply with this law, as well as for its own interests, and this would leave a margin of fifty per cent. for any possible depreciation in value of the real estate, excluding the value of the buildings. The company has these mortgages in its possession and, doubtless, has full knowledge of the nature and adequacy of the security, and, except in two or three instances, no case of a loan or mortgage was presented where the company had lost, or probably would lose, anything by reason of the depreciation in the value of the security.

In fine, the court was asked by counsel to take this whole lot of mortgages covering about eight hundred thousand dollars, and to conclude that by reason of the general depreciation of real estate, that these mortgage securities, as a whole, were affected to the extent of from twenty-five to thirty per cent. of their par value.

This corporation, doubtless, was not required to list for taxation any note at more than its true value, and if, by reason of the insolvency of the maker or the inadequacy of the security, its value was depreciated,

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that should have been and should be rightly taken into account. It doubtless would have taken considerable time to go through this list of mortgages and see exactly what was good and what was not, but in the absence of such evidence the court can only conjecture that by the general depreciation of real estate, the securities were impaired and impaired to the extent of affecting the loans and the money to be recovered thereon. In the absence of some specific evidence showing what loans were impaired in value and to what extent, I am unable to conclude that the officers of this company were warranted in making any deduction from what these loans called for, and from what the company itself, in its estimates for valuation to the insurance commissioner, represented, their value to be, on account of a general shrinkage in the value of real estate.

Coming to the item in the returns in question, cash on hand and in banks, without question that has its *situs* where the company is located in this case, and is taxable in Medina county; and the difference in the amount of cash so returned for taxation each year, and the amount reported to the superintendent of insurance will be seen from the following statement:

Cash reported to the superintendent of insurance :

For the year 1886.....	\$183,622 10
" 1887.....	210,630 79
" 1888.....	137,992 39
" 1889.....	224,486 24
" 1890.....	291,759 80
" 1891.....	380,897 78

Cash reported to the auditor for taxation :

For the year 1887.....	\$78,468 50
" 1888.....	169,591 01
" 1889.....	127,256 90
" 1890.....	145,408 88
" 1891.....	177,331 15

Now, it is said in answer to this there may be undervaluations upon some items, and perhaps, larger valuations upon others, that it is sufficient if the property, taken as a whole and in the aggregate, meets the requirement of a fair valuation of the property in money, but it would seem to the court that upon this item there certainly could be no misapprehension.

Coming, therefore, to the principal question in this case, namely, were these returns for taxation so made by the company in 1886, 1887,

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1888, 1889, 1890 and 1891, false as that language is construed by the Supreme Court? I have already indicated that, in my opinion, the company's returns were, during all these years, incorrect, and for many reasons. I hesitate to find that the returns for these years were not only incorrect, but that they were false returns within the meaning given to the word "false" in *Ratterman v. Ingalls*, *supra*, but culpable negligence is sufficient, though there may be no design to mislead and deceive, to make a return false. And, taking all the evidence into consideration, I find that the returns made for taxation during these years were grossly careless, and I have come to this conclusion largely by a comparison of the returns made by the officers for taxation and the returns by the same officers to the state superintendent of insurance.

Having determined this question, the next question relates to the matter of the penalty of fifty per cent. which the auditor is authorized to add in case the returns are false and untrue. The auditor of Medina county followed the wording of the statute in correcting the returns, and ascertaining the true amount that should have been returned, adding fifty per cent. thereto as penalty, and deducting the amount returned; and it is claimed that this was not the meaning of the statute, and the fact that the general assembly of this state, by an act passed April 24, 1893, 90 O. L., 233, amended the law of April 14, 1886, so as to have the penalty apply only as to the amount ascertained as omitted, is a legislative construction of the act. I do not think that this follows. The court must ascertain the meaning of the law from the language used. There is very much force in the arguments of plaintiff's counsel that the method employed by the auditor in this case was oppressive and inequitable, inasmuch as it places a penalty upon the taxes returned as well as the amounts omitted. It seems very harsh indeed to require this, but this seems to have been the construction given to the act before this amendment in *Genins v. Auditor*, 18 Ohio St., 534. And to the same effect in *Gager, Tr., v. Prout*, 48 Ohio St., 89. The law in force when these corrections were made by the auditor was clear and unambiguous. For the five years next prior to the tax year when the duplicate was being corrected the auditor was to ascertain, as near as is practicable, the true amount that such tax delinquent should have returned for each one of said five years, and the true amount for the year in which it was being corrected—in this case 1891, and to the amount so ascertained (not including the current year) he shall add fifty per centum. Although admittedly a severe rule up to the time that the statute was amended in 1893, that was the practice, and in the cases referred to the court recognized it as valid.

It was doubtless the injustice of which plaintiff's counsel complained that induced the general assembly to amend the statute and make it more consonant with equity and justice.

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The object of secs. 2781 and 2782, Rev. Stat., is not to create an obligation against the taxpayer; they are only a remedy for the collection of what he already owes, to-wit, taxes on all his personal property for every year whether the same was returned for taxation or not. Lee v. Sturges, 46 Ohio St., 153; State ex rel. v. Raine, 47 Ohio St., 447; Gager v. Prout, 48 Ohio St., 89.

Assuming then that the plaintiff owes to the treasurer the simple taxes on the property which it did not return, and that secs. 2781, and 2782, Rev. Stat., were intended to give a remedy for the collection of this debt, it seems to me that I will be doing full justice to the state if the state is made good for what it has lost in this respect, and I think the court has full power to remit the penalty on the sums in fact returned for taxation.

The eighteen upon whom the Tower of Siloam fell were not the chief or only offenders in the Holy City; there were others; and I am quite persuaded that in respect to its returns for taxation, the Ohio Farmers Insurance Company has done more than many other citizens and corporations in this state have been and are doing in respect to their property when the returns are made for the purpose of taxation; indeed I think that there are very many corporations in Ohio that return even a far smaller percentage of the actual value of their assets in money than the plaintiff's returns show in this case. Time was when the wealth of the people consisted largely of real estate, or tangible personal property, goods, wares, merchandise, live stock, agricultural implements, furniture and watches, but times have greatly changed in that respect. By far the largest portion of the wealth of the people is now represented by intangible personal property such as stocks, notes, bonds and mortgages. The rich men of former times in this state were land holders. Now they are stockholders and their property is represented by holdings in railroads, industrial, commercial and banking corporations, evidenced by certificates of stock. The increase in this description of property within the last ten years is marvelous. The true value of such property is often known only by those who possess it, while the facility with which it may be assigned or transferred from hand to hand affords abundant opportunity for its effectual concealment from taxation, so that the evils of unequal taxation are becoming yearly more apparent. These reflections are, perhaps, not strictly in place in a judicial opinion. I indulge in them only as showing the injustice and unfairness of departing in any case from the plain requirement of the constitution, that all property shall be taxed at its true value in money, and not at a percentage of its value. I am, therefore, not disposed to let the axe fall with unjust severity, but will remit the penalty as I have above indicated, and also

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exclude the estimated or increased value as found by the auditor each year, which will make the amounts so corrected by the court as follows:

Year.	Amount which the court finds the In- surance Co. should have listed for tax- ation.	Amount listed by Insurance Co. for tax- ation.	Amount omitted.	Amount omit- ted, plus 50 per cent. pen- alty.	Rate.	Tax.
1886	\$1,198,224 32	\$ 890,864 00	\$312,360 32	\$468,540 48	\$ 1 02	\$ 4,770 11
1887	1,265,648 00	980,861 00	384,787 00	504,180 50	1 02	5,122 24
1888	1,368,368 00	980,866 67	486,681 33	640,021 99	.96	6,230 61
1889	1,417,300 00	1,008,671 08	408,688 92	612,948 88	.98	6,006 84
1890	1,509,609 00	1,064,944 92	444,664 08	664,996 12	1 04	6,986 75
1891	1,612,516 00	1,118,198 30	494,317 70		1 07	5,280 19
						\$34,654 74

CRIMINAL PLEADING.

[Franklin Common Pleas, 1899.]

MARY HUMMEL v. STATE OF OHIO.

1. RULES AS TO INDICTMENT APPLY TO AFFIDAVITS.

The rule that an indictment must aver, with reasonable certainty, all the material facts which are necessary to be proven to procure a conviction, which has not been changed by the code of criminal procedure, applies to prosecutions in police court based upon affidavits.

2. NO RELAXATION EXCEPT IN MATTERS OF FORM.

If there is any relaxation of the rule as to magistrates generally, it is as to matters of form only. The charge, whether in affidavit or indictment, must allege in some form, with reasonable certainty, every material fact necessary to be proven to procure a conviction, which includes every fact essentially necessary to a description of the offense.

3. PROSECUTIONS FOR USING OBSCENE AND LICENTIOUS LANGUAGE, ETC.

In criminal prosecutions for using or uttering obscene or licentious language or for libel or profane swearing, enough of the language should be set forth and such other proper allegations as are necessary to show that a crime has been committed. Any thing less than this renders an affidavit or an indictment fatally defective.

4. LANGUAGE OMITTED SHOULD BE DESCRIBED.

An affidavit in a prosecution for using obscene and licentious language in the presence or hearing of females, under sec. 7026, Rev. Stat., that accused "being over fourteen years of age, did unlawfully and wilfully, utter and use obscene and licentious language, unfit for allegation herein, in the presence and hearing of females" fails to charge an offense. The language "unfit for allegation herein" may excuse a failure to set forth every word of the language used, but in such case the words omitted should be described with sufficient particularity.

ERROR to Police Court.

EVANS, J.

The plaintiff in error was tried, convicted and sentenced in the police court upon an affidavit which charged the offense as follows, to-wit, "that one Mary Hummel, on or about the 15th day of June,

Hummel v. State of Ohio.

1899, at the county of Franklin and state of Ohio, being over fourteen years of age, did unlawfully and wilfully, utter and use obscene and licentious language unfit for allegation herein in the presence and hearing of certain females whose names are unknown to affiant.

The prosecution was under sec. 7026, Rev. Stat., which provides as follows:

"Whoever being over fourteen years of age wilfully * * * utters or uses any obscene or licentious language or words in the presence or hearing of any female, shall be fined," etc.

Does the affidavit charge any offense known to the laws of Ohio?

It is a well settled rule of criminal pleading, that an indictment must aver, with reasonable certainty, all the material facts which are necessary to be proven, to procure a conviction, and this rule has not been changed by the code of criminal procedure. Ellars v. State, 25 Ohio St., 385, 388. This rule of pleading applies to prosecutions in the police court, based upon affidavits. If there is any relaxation of the rule as to magistrates generally, it is as to matters of form only, and not as to matters of substance. The charge, whether in affidavit or indictment, must allege, in some form, with reasonable certainty, every material fact necessary to be proven to procure a conviction—and this includes every fact essentially necessary to a description of the offense.

The averment that the language was "obscene and licentious" characterizes the offense; it is merely the opinion or conclusion of the affiant. It can not dispense with a statement of the constituent facts, which must be alleged. They are always indispensable—but the conclusion may be omitted. The facts descriptive of the crime must be alleged so that the accused may have notice of what he is to meet, and of the act done which it behooves him to controvert; and so that the court, applying the law to the facts charged against him, may see that a crime has been committed. Lamberton v. State, 11 Ohio, 282, 284.

The averment in the affidavit that the language is "unfit for allegation herein," may excuse a failure to set forth every word of the language used; but in such case the word or words omitted should be described with sufficient particularity. 14 Ency. Pl. & Pr., 1157.

It is not always necessary to set forth in the charge, the language in *haec verba*; often this would be impracticable, if not impossible. Too great strictness should not be required. But enough of the language used should be set forth and such other proper allegations as are necessary to show that a crime has been committed. Anything less than this in an affidavit or indictment, renders it fatally defective in criminal prosecutions for using or uttering obscene or licentious language or for libel or profane swearing. As to obscene language, *vide*, 14 Ency. Pl. & Pr., 1156, 1159; Lewdness, 13 Ency. Pl. & Pr., 20; Profane swearing, 16 Ency. Pl. & Pr., 1080. As to indictments, informations, and complaints

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generally, see 10 Ency. Pl. & Pr., 472, *et seq.*, 481, 483 and 487. Dillingham v. State, 5 Ohio St., 280; Poage v. State, 3 Ohio St., 234, 235.

As the affidavit fails legally to charge an offense, the judgment of the police court, on its face, is clearly erroneous, and should be reversed. Pope v. Cincinnati, 2 Circ. Dec., 285; Little v. State, 4 Circ. Dec., 285; Davis v. State, 19 Ohio St., 270; Geiger v. State, 3 Circ. Dec., 141.

Judgment reversed at cost of defendant in error, and plaintiff in error discharged. Section 7360, Rev. Stat.

SALES—TRUSTS—ARBITRATION.

[Cuyahoga Common Pleas, September 26, 1900.]

JAMES CORRIGAN V. JOHN D. ROCKEFELLER.

1. AWARD OF ARBITRATORS CONCLUSIVE.

Where the contract of submission to arbitration provides that an award made in accordance therewith shall be final and conclusive, a court has no power to review either the findings of fact or law made by the arbitrators. As to these matters, the law leaves the parties where they have placed themselves by their agreement to abide by the judgment of the arbitrators.

2. ARBITRATORS—STATEMENT OF FACTS AND LAW—EVIDENCE.

Where the contract of submission to arbitration amounts to nothing more than a final award, it is competent for the arbitrators to make and deliver to the respective parties a statement of their findings of fact and law, and such findings are available evidence in behalf of either party, as showing all matters therein disclosed, and are competent to be resorted to by the court to determine the validity of the award itself.

3. DEPOSITIONS OF INDIVIDUAL ARBITRATORS ADMITTED.

While the question whether the depositions of individual arbitrators showing the manner in which they considered the questions and what their individual opinions were concerning the various matters before them are admissible is not free from doubt, the court held that, as it was probable the plaintiff had no right of appeal, and that there might be a question as to the correctness of the objection, it was advisable to give the plaintiff the benefit of all the evidence.

4. RULE AS TO CONCURRENT FINDINGS.

It is not essential to the validity of an award under a contract of submission to arbitration, providing, among other things, that "hearings may be adjourned from time to time and place to place by a majority of the arbitrators, but in all other matters all of them must concur," that arbitrators should concur in findings upon matters not involved in their award. Thus a failure to concur in a finding as to the adequacy of price paid by a trustee to his *cestui que trust* for certain shares of stock is not fatal to an award in favor of the trustee upon the ground of laches on the part of the *cestui que trust* in failing to rescind the sale.

5. PARTY CANNOT QUESTION AN AWARD ON FAVORABLE FINDING.

It does not lie with a party to a contract of submission to arbitration to complain of an award against him on the ground that a finding in his favor on one of the matters involved was irregular, or that the arbitrators failed to concur, not in any fact which was the basis of such party's right to recover, but in finding facts essential to sustain one of the defenses to his right to recover.

6. LACHES—LIMITATION OF ACTIONS.

The statute fixes the limitation in which a suit to rescind a sale must be brought, which is arbitrary and without variation, while equity determines the length of time which constitutes fatal laches, according to the circumstances of each particular case. There is no relationship between the two. Therefore, a finding by arbitrators that plaintiff in an action to rescind a sale was barred by failing for two years to give notice of his intention to rescind the sale, is not unlawful or in conflict with the statute of limitations fixing a period of four years in which such actions may be brought.

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LAMSON, J.

In this action on June 30, 1897, the plaintiff filed his petition against the defendant in the court of common pleas of this county, and by this petition he sought to annul and cancel a certain contract made and entered into in writing between himself and the defendant on or about February 19, 1895, by which contract, among other things, plaintiff sold to defendant 2,500 shares of Standard Oil Trust certificates, being, as the court understands, certificates of holdings representing the interest of the plaintiff at that time in an unincorporated association, the property of which was held and the business managed by a board of trustees, of which the defendant was one, and perhaps the president of said board.

The grounds upon which the plaintiff sought to annul this contract can be classified generally under two heads, without going into the particulars of the allegations.

The first, which might be called actual fraud, consisting of false and fraudulent misrepresentations on the part of the defendant as to the value of the certificates at the time, and of the property which these certificates represented, which was in the hands of the trustees to be distributed to the various owners of the same. False and fraudulent claims on the part of the defendant that certain large loans from defendant to plaintiff had matured, and fraudulent demands made by defendant on plaintiff for payment of the same, and threats made that unless payment was immediately made, a forced sale of these certificates, then held by the plaintiff as collateral security for these loans, would be made, and the refusal of the defendant to furnish any information to the plaintiff as to the real value of these certificates, and as to the amount of property in the possession of the trustees, or under their control, or available, as represented by the certificates, to enable the plaintiff to make any loan or dispose of the certificates for the purpose of satisfying this large indebtedness to the defendant, all of which the plaintiff says was done with the fraudulent intent and purpose to compel the plaintiff to sell said certificates to him, which he says was accomplished in the transaction out of which this contract grew.

Second, that the relation of trustee on the part of said defendant existed towards this plaintiff, who was then his *cestui que trust* as to these certificates, and all of the property which they represented, which relationship the plaintiff alleged made it the duty of the defendant to furnish to the plaintiff full and ample means of information concerning the property, its amount and value so held in trust and to give to the plaintiff all information possessed by the defendant at any and all reasonable times when called upon so to do; and that defendant failed to do this and dealt with the plaintiff with reference to this trust property without thus furnishing plaintiff with knowledge, or the means of knowl-

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edge, concerning said property, which was possessed by the defendant at the time said transaction took place and said contract was made.

On September 11, 1897, the defendant filed his answer in this court in which, after making certain admissions as to the creation of this trust, and the allegations concerning it in the petition, and its property and the payment of dividends, the making of certain loans from himself to the plaintiff, and the contract as alleged in the petition he denied all of the other allegations in the petition which charged him with fraud, either active or constructive, under the first and second heads in which I have classified them.

On January 7, 1898, the plaintiff filed a reply taking issue with certain affirmative allegations of the answer, none of which are important in the consideration of the case as heard before this court. In this condition the cause remained until September 1, 1899, pending in this court, when the defendant, by leave of court, filed his supplemental answer in the same, setting forth, in substance, an agreement in writing between the parties to submit the issues thus joined between them to the award and determination of William G. Choate and William D. Guthrie of New York and William A. Lynch of Canton, Ohio, and that said agreement provided, among other things, that each of said parties should execute and deliver to the said arbitrators a stipulation providing that judgment might be entered against them in said action without notice to the other party or his attorney, and that the plaintiff should further execute and deliver to said arbitrators a general release from himself to this defendant from any and all manner of claims and causes of action, whether at law or in equity, set forth in the petition in this action.

It further alleges that said arbitrators met pursuant to said agreement, hearing was had, both parties being present and offering testimony therein, and that within the time required by the agreement said arbitrators made their finding and award in said cause, and thereby found the issues joined in favor of the defendant, and that the costs and expenses of said arbitration, amounting to \$4,750.00, should be borne equally by said parties, further alleging that before entering upon said hearing defendant executed and delivered to said arbitrators the stipulation required of him, and the plaintiff executed and delivered to said arbitrators his warrant of attorney for the entry of judgment herein against him, as by said agreement, which is as follows:

IN THE COURT OF COMMON PLEAS.

State of Ohio, } No. 60,101.
Cuyahoga County. }

James Corrigan, plaintiff, v. John D. Rockefeller, defendant.

It is hereby stipulated and agreed that judgment may be entered in this action forthwith without further notice to the plaintiff or his attorney, dismissing this action upon its merits without cost as against the

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defendant, and that an order for judgment may be entered accordingly without notice.

Dated October 18, 1898.

JAMES CORRIGAN,
Plaintiff.
BURKE & INGERSOLLS,
Attorneys for plaintiff,

Said agreement was duly acknowledged.

It is further alleged that the defendant, before the making of said award by said arbitrators, paid and performed all the conditions of the same, and that he is entitled to and asks to have said judgment entered in said cause in his favor, as provided by said agreement and power of attorney, thus herein set out.

On September 27, 1899, the plaintiff filed his reply to the said supplemental answer of the defendant, in which reply the plaintiff admits the execution of the various papers and agreements set out in the said answer, and that the said arbitrators, about April 20, 1899, in form made an award; but the plaintiff alleges said award to be null and void for the reasons,

First. That said agreement provided that "Hearings may be adjourned from time to time and place to place by a majority of the arbitrators, but in all other matters all of them must concur." That disregarding this provision of said agreement, said arbitrators failed to and did not concur in all the issues joined between the parties, and made the award in violation of that requirement of said agreement.

Second. That said arbitrators did not consider said issues and evidence offered by either party together, but upon the conclusion of said hearing separated, and afterwards the issues were from time to time considered by two of said arbitrators in the absence of the third.

Third. That said arbitrators were required to hear and determine the issues between said parties according to law, as if they were sitting as a court of equity hearing said action in the state of Ohio; that this they failed to do, and did not find the law and facts correctly.

This cause came on to be heard by this court upon this supplemental answer and this reply. Upon that hearing the defendant offered in evidence the contract in writing providing for said arbitration, and the award signed by all of the arbitrators, and the supplemental agreement between the plaintiff and the defendant extending from time to time, until May 1, 1899, the time within which the arbitrators might render and deliver their award.

The plaintiff offered in evidence the paper denominated "Opinion by Arbitrators" and the depositions of the arbitrators taken since the hearing before them. Upon this hearing the defendant's counsel objected to the introduction of the evidence which was offered by the plaintiff, and

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the questions thus raised are properly the first questions to be considered. The first objection was to the paper signed by the arbitrators and styled "Opinion of the Arbitrators." In my judgment, this objection should be overruled. The contract of submission to arbitrate went further than a mere final award. It provided, as claimed by the plaintiff, that the arbitrators should all concur in all matters other than adjournments of time and place, and the parties might have requested them to make and deliver their findings so as to show on the face of the record whether or not the award was in accordance with these provisions of the contract. This seems to have been the view taken of their duties by arbitrators, for they prepared this paper styled "Opinion" setting forth in the same, their findings of fact and of law, and delivered a copy to each party at the same time they delivered the award itself; and I think it patent that it is available for each party as showing all matters and things therein disclosed and competent to be resorted to by the court for that purpose in this hearing.

The other objection made by the defendant to the depositions of the individual arbitrators, showing the manner in which they considered the questions in the case and what their individual opinions were concerning various matters before them, is not, to my mind, so free from doubt. But as it is probable the plaintiff has no right of appeal, and there may be a question as to the correctness of the objection, I deem it advisable and proper to give him the benefit of all the evidence offered upon the issues made by the supplemental answer and reply thereto, so that objection is overruled.

It was conceded upon the hearing by both parties that if the award pleaded by the defendant had not been rendered in accordance with the terms of the contract of submission, then the relief asked for by the defendant in his supplemental answer could not be granted; but that if said award had been rendered according to the terms of said agreement, the defendant would be entitled to said relief, and the case would be determined thereby.

This brings us to a consideration of the real grounds of objection put forward by the plaintiff to the award set up by the defendant. As a matter of convenience, I will consider them in the inverse order in which they have been pleaded and stated heretofore, which makes the first objection that the arbitrators did not correctly determine the law applicable to the facts found. It is a well-settled proposition of law, which I presume will not be questioned, that an award made by arbitrators chosen by the parties to a cause pending to determine the issues therein, is not reviewable either as to its conclusions of law or facts, unless the contract of submission makes provision for such a review.

Upon an inspection of this contract of submission, I fail to find any provision therein looking towards a review by the court of the findings of said arbitrators, but, on the contrary, I find it expressly provided that

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the award made in accordance with said agreement shall be final and conclusive upon the parties, and that each party will stand to and abide by and perform said award under the agreement. Under this agreement it is clear, to my mind, that this court on this hearing has no power whatever, to review either the findings of fact or law made by the arbitrators in this case. Therefore, whether their judgments in these respects are correct or not is a matter with which this court has nothing to do. As to these matters the law leaves the parties where they have placed themselves by their solemn agreement to abide the judgment of these arbitrators as final and conclusive upon them. In fact, beyond the mere recital contained in the paper called an "Opinion," this court has no knowledge whatever of the facts in this case ; and this paper sets out simple findings of fact without any disclosure either by the paper or upon the hearing by evidence of the testimony upon which the arbitrators based their conclusion. This was undoubtedly because both parties recognized the well-settled rule that the court had no authority under the contract of submission to inquire into the evidence presented to the arbitrators for their consideration, and this rule applies as conclusively to the law as it does to the facts ; and this court has no more right to inquire into the correctness of the legal rules which the arbitrators selected and applied to the facts they found than to the facts themselves. I have given so much consideration to this question not because of the force with which it was presented to the court, but because, in my judgment, it bears with considerable importance upon the other phases of the case.

To the second objection that the arbitrators did not consider the issues and the testimony submitted to them together, but upon the close of the meeting before they separated, and thereafter two of the arbitrators at different times considered questions involved in the case in the absence of the third, it is sufficient to say that the testimony does not sustain that objection. The depositions of the arbitrators, show —while they do disclose the fact that the arbitrators among themselves at different times considered the subject-matter of the questions,—that at no time were any conclusions formed, or determination made of any of the matters or things involved in this hearing before them, except in the presence and hearing of all of the arbitrators named.

Coming then to a consideration of the other and more serious reason assigned and pressed upon the court by the plaintiff for disregarding this award, with the understanding that in the consideration of this subject the court has nothing whatever to do with the correctness of the findings of law or facts made by the arbitrators, as the parties have seen fit to provide for that in their agreement, it is claimed, in substance, that the contract of submission provides that, except as to adjournment from time to time or place to place, in all matters all of the arbitrators must concur ; that as a matter of fact, shown by the paper marked

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"Opinion," and the evidence by the depositions, the arbitrators did not all concur in all matters under their consideration.

In considering this objection, I find upon investigation of the contract of submission, this provision:

"Hearings may be adjourned from time to time and from place to place by a majority of the arbitrators, but in all other matters all of them must concur. The award of the arbitrators must be in writing in duplicate and signed by all of the arbitrators, and an original thereof delivered," etc., providing for the manner of delivery of the same. The construction of this language is important in determining the objection raised under it by the plaintiff, and to do this it is important to refer to other provisions of the agreement, as it should be considered as an entire agreement, and must be so considered in order to give proper force and effect to its various provisions.

On the first page, after reciting the pendency of this action, this agreement provides: "Mr. Corrigan and Mr. Rockefeller have agreed to submit and refer all the issues of law and fact joined between the parties in said action to the award and determination of William G. Choate," etc., naming the persons.

Again on the same page, after formally designating by name and residence William G. Choate and his associates as arbitrators, it provides, "to be arbitrators between us, to whom we refer all the issues of law and fact joined by the pleadings in said action, to hear and finally determine the same."

Again on the same page it provides, "The hearing before the said arbitrators shall be conducted under the pleadings and proof in the said action, and in all respects in the same manner as though said issues were regularly tried in the court of common pleas in the state of Ohio. The said arbitrators shall hear and determine all the issues in the said action as though they were sitting to hear and determine said issues as a judicial court and with the same power to permit amendments to pleadings, and to pass upon the sufficiency of the pleadings and the competency and relevancy of evidence, and to do such other things as upon the trial of an action are possessed by the courts where the said action is now pending, providing that no amendments shall be allowed which shall substantially change the cause of action."

Then upon the third page appears the provision which has already been quoted, regarding the concurrence of all the arbitrators in all matters other than adjournments from time to time and place to place.

It is clearly apparent, from a consideration together of all these provisions that it was the full intent and purpose of the parties to this contract of submission, to vest the arbitrators with full powers to fully and finally end the matters in dispute between them in this case, and that their judgment or finding, whether for plaintiff or defendant, should be based upon such findings of law and fact as would make it a complete

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answer, not only in terms but in fact, to every claim or issue raised against the finding thus made by them in the case, and that in all these material facts thus found, and upon which their final award should be based, all the arbitrators should concur.

Such a final conclusion was in the minds of the parties to this contract, and it is evident that it was with reference to such finding that the terms "all other matters" was used in the provisions of this contract by the parties. So that so far as the issues raised by the supplemental answer and reply are concerned, the requirements of the contract that the arbitrators shall concur in *all other matters*,— has reference to all matters, whether of law or fact, the determination of which would be material or necessary to sustain the final finding made in the case. In fact, in the argument on this objection, this seems to have been substantially the construction placed upon this provision by both parties, and it seems to have been the one recognized by the arbitrators themselves.

The question then is, does the finding of the arbitrators come within these requirements of the contract? To determine this we must apply the findings to the issues.

The plaintiff sought by his petition to force a rescission of the contract made between himself and the defendant. The grounds were, first, actual fraud, such as deceit, schemes, misrepresentations, etc. Second, that at the time the contract was made the relation of trustee and *cestui que trust* existed between them.

To the first ground, the arbitrators say as follows in their opinion: "They are satisfied" (speaking of themselves), and I quote their language, "by the evidence that the charges of actual fraud set forth in the complaint against the defendant are not proved. On the contrary, the evidence has satisfied them that the defendant made the purchase on the stock in question in good faith and at what he believed to be its full value and a fair price, and that he did not use the circumstances or the necessities of the plaintiff as a means of extorting from him either the purchase of the stock or its purchase at an improper or insufficient consideration, and that he was actuated by a desire to accommodate the plaintiff and relieve him from embarrassment by making with him the agreement of which the purchase of the stock was a part."

This would seem to be as full a finding against the plaintiff, all arbitrators concurring therein, as the evidence shows, as could be made, as to every allegation and material fact claimed or set out in the petition as a basis for plaintiff's right to have the contract rescinded, except such as grow out of the alleged relation of trustee and *cestui que trust*, and in fact, that seemed to be conceded by the plaintiff upon the hearing of this case.

Having thus completely disposed of these allegations of actual fraud, as the arbitrators termed them, against the plaintiff, they took up

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the second and only other ground of recovery contained in the petition, to-wit, that growing out of the alleged relation of trustee and *cestui que trust* and in the second subdivision of their opinion and they say as follows:

"Second. We are of the opinion that the relation between the defendant and the plaintiff with respect to the stock in question was that of trustee and *cestui que trust*, within the meaning of the equitable rule which renders a purchase by the trustee voidable at the election of the *cestui que trust*."

The arbitrators proceed further in this second sub-division to give reasons for their finding, but these are entirely immaterial in this inquiry.

Then again, under the same subdivision, after giving their reasons for finding that this relationship existed, they find: "This relation gave the trustee superior means of information with regard to the property, which information may well be taken to be superior means of ascertaining its value."

This last finding which I have read is, in fact, but a statement of what the law, under the circumstances and facts already found in that subdivision, would be presumed to exist.

The testimony taken, shows, outside of the opinion itself, that these findings were concurred in by all of the arbitrators, except wherein the opinion discloses the fact that they did not concur.

These findings of law and fact set out in the second sub-division of the arbitrators constituted good grounds for the rescission of the contract in question. And upon these findings of law and fact the plaintiff was entitled to a final judgment or award in his favor, provided the arbitrators could not all concur in finding from the evidence that the defendant had made out some one or more of the defenses which he claimed; and that seems to have been the view, of the arbitrators as clearly expressed, not only in the opinion itself, but in this testimony.

The record discloses that the defendant presented a number of reasons why the plaintiff should not recover against him. It is only necessary for the court to consider the two which are considered by the arbitrators. One defense made by the defendant was that although this relation of trustee and *cestui que trust* existed between him and the plaintiff, of such a character that according to the rules of equity, it rendered the purchase of this stock voidable at the election of the plaintiff, yet that in fact he had no advantage in the making of the contract from any superior knowledge which he gained from his relation as trustee, and that by reason thereof the parties dealt with perfect equality, and he paid the full value of the stock.

Plaintiff's counsel in their brief say: "This relation being shown, well-understood rules of equity imposed upon the trustee, in order to

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support the purchase of the trust property and the validity of the contract, the necessity of proving affirmatively certain facts establishing the entire fairness of the transaction between himself and his *cestui que trust*," among which are recited.

"First. That the price which he paid for the trust property was its full and adequate value, and

"Second. That he made full and complete disclosure to the plaintiff of all the knowledge possessed by him of the state, condition and value and earning power of the trust property; that he had no advantage in the transaction by reason of his superior knowledge gained in his relation of trustee."

This is undoubtedly a correct statement of the law and the duties of the defendant under that finding made by the arbitrators, which was recognized, not only by the arbitrators, but by the defendant, as well for he undertook, before the arbitrators, to establish these things as a defense to this right of action which the arbitrators had found existed against him and in favor of the plaintiff.

In the third subdivision of their opinion, the arbitrators give their conclusions of this matter as to this defense, and they say: "The arbitrators are not unanimous on the question whether the defendant has shown affirmatively that his purchase of the stock was for its full value at the time of the purchase, or that in fact he had no advantage in the transaction from the superior knowledge which he gained from his relation of trustee."

This is the finding in the third subdivision of the opinion upon this first defense which is considered by them, and which was thus put forward by the defendant as a complete defense to this right of recovery which had been found to exist against him, and in favor of plaintiff, and the arbitrators, so far as the opinion discloses, did not all concur in finding these facts which the plaintiff says were necessary to be proven by the defendant, and which the plaintiff says it was his duty, under the law, to establish in order to relieve himself of the liability to respond to the plaintiff because of the relationship existing between them at the time this purchase took place, and therefor the arbitrators did not give the defendant the benefit of that defense. When I turn to the testimony of the arbitrators, I find that they go into this very clearly and more fully. Reading from the deposition of William G. Choate, he says: "The first question that we considered was the question of actual fraud. On that question I think that at our first meeting after the case was submitted, we compared our views and found that we were all of one mind, as stated in the opinion. The next question that we considered was the question of the relation of trustee and *cestui que trust*. Having come to the conclusion, as stated in paragraph second, that that relation existed, we then considered the question whether this was on all the facts one of those rare cases where the court of equity might

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sustain the contract notwithstanding the existence of the relation ; and the first question that was discussed bearing upon that main topic was the question, which was debated by counsel and was by us understood to be in controversy, whether Mr. Rockefeller paid full and ample value for the stock. As I said yesterday, that question was very much discussed. In point of fact, there were three views entertained by the arbitrators. Each had a different view. One of the arbitrators was of opinion that Mr. Rockefeller not only paid the full market value, but but the full and ample actual value. Another of the arbitrators was of opinion that while he might be said to have paid the actual market value, yet that upon all the evidence, the property was worth more ; and I do not think that that arbitrator varied from that to the end. This second arbitrator that I refer to, doubted whether there was strictly and properly a market for the stock. The third arbitrator thought that Mr. Rockefeller paid the market value, but doubted whether, on the whole, the property might not really have been worth more. That expresses, I think, the difference upon one ground. Then the arbitrator who thought that Mr. Rockefeller paid full and adequate value, also had this idea, as I understood it that while there was technically a relation of trustee and *cestui que trust*, yet that upon all the evidence, considering what Mr. Corrigan knew, and the extent to which Mr. Rockefeller availed himself of what we have called his *superior means* of knowledge, that this superior means of knowledge, which we thought Mr. Rockefeller had, did not practically enter into the trade at all, did not affect his mind. That is what is meant by this expression under division third : 'or that, in fact, he had no advantage in the transaction from the superior knowledge which he gained from his relation of Trustee.' The other arbitrators did not agree with this view. Consequently we could not base any conclusions favorable to the defendant upon the view entertained by this one arbitrator. That, I think, explains the differences which are expressed, or intended to be expressed, in the beginning of this third division of the opinion."

In other words, in the third subdivision of this opinion, the arbitrators are considering the defense which the defendant made to the cause of action already found to exist in favor of the plaintiff in the second subdivision of the opinion, to-wit, that notwithstanding that relationship, on the face of it gave to him superior means of knowledge, yet in fact he did not possess it, and that he paid full value for this stock.

Upon that defense there were opinions held by the arbitrators, and a majority of them were opposed to finding the material facts of that defense to exist. Only one arbitrator was of the opinion that full market and actual value, had been paid for the stock and that no advantage was obtained or possessed by Mr. Rockefeller in the trans-

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action by reason of what they termed his superior means of knowledge. The other two arbitrators, the majority of them, entertained the opinion that while the full market value was paid, yet the full actual value was not paid, and that there were superior means of knowledge available to Mr. Rockefeller and not available to Mr. Corrigan, which therefore left a majority of the arbitrators against sustaining this defense and if the case had stopped there, if there had been no other question or defenses in this case, undoubtedly the findings would have been by the arbitrators in favor of the plaintiff, rescinding this contract and restoring the parties to the position which they sustained towards the stock and the subject-matter of the contract at the time it was made and prior thereto.

It is this failure of the arbitrators to concur, and this alone which has been made the ground of this complaint. How is it possible for the plaintiff to complain of this failure of the arbitrators to all concur as to this subject-matter? A majority failed to concur, not in any fact which was the basis of his right of recovery, but they failed all to concur in finding the facts essential to sustain a complete and adequate defense to his right of recovery. In fact, a majority of them did not concur in it, and it would have been impossible, either under this contract or any other that would require a majority to make a finding to have sustained that defense, and as the plaintiff had the benefit of it, and as the holding was in his favor, certainly he cannot complain, and in my judgment, the acts of the arbitrators were clearly proper, and the plaintiff had no right to complain thereof. It was not necessary that the arbitrators should find affirmatively that superior advantages for knowledge were possessed by Mr. Rockefeller and that he did not pay an adequate price; that was not necessary in any view of the issues upon the findings which they made. Those only became material in a defense made by the defendant. The law put its stamp upon transaction itself and presumed and inferred, from the relationship existing between the parties, that these two men had not been dealing upon the equality as to the means of knowledge, and they had been dealing, because of that relationship, at a disadvantage, so far as this plaintiff was concerned, and at an advantage so far as this defendant was concerned, because the defendant was trustee and the plaintiff was *cestui que trust*, in relation to the subject-matter of the same. And that was the view these arbitrators took, for having thus found that the defendant had not affirmatively made out, his defense to this right of recovery which they had found in the plaintiff, they then treated the relation of the parties, so far as the issues are concerned, as a right to the relief prayed for by the plaintiff, unless some other reason existed for their refusal to give that relief; and they assumed then upon the findings which they had made, that this was a contract which, at the time it was entered into by the immediate parties, was voidable by the plaintiff at his election, and was binding upon both

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of the parties until such an election was made by the plaintiff, for so far as the defendant was concerned, no act of his could validate or invalidate the contract. He could only await the action of the plaintiff in that matter. To thus invalidate this contract, involving hundreds of thousands of dollars worth of property, there was certainly required some definite and affirmative act on the part of the plaintiff which would convey clearly to the defendant his intention no longer to recognize the contract as an existing obligation upon him or to longer take and enjoy the advantages of the same. As to this duty on the part of the plaintiff, the arbitrators found that the plaintiff did not act until the filing of the petition in this case, about two years after the contract was made, as at that time only did the plaintiff make his election to treat the contract as no longer binding upon him, and inform the defendant of his election in that respect.

Now, as I have said, as to the correctness of these findings, either of fact or law, this court has nothing whatever to do; it neither has the means of reviewing them, nor power to review them.

In this situation of the proof upon the hearing, the testimony shows that the defendant urged that this lapse of time between the making of the contract and the plaintiff's election to treat it as void, constituted a complete defense to his right to recover under the equitable doctrine known as laches; that is, that where in equity a contract is voidable at the election of a party because of some infirmity existing at its inception, that right thus existing at that time may be lost to the party by postponing the exercise of the same beyond a reasonable time. This doctrine is clearly established and is based on considerations of justice and right which are just as sacred in the eyes of the law as are those which give to the party the right to annul his contracts for infirmities existing in their inception.

In regard to this defense in the case, the arbitrators found that when this contract was entered into neither party understood that the relation between them was such that the plaintiff had a right to rescind the contract, but within a very few weeks after the contract was executed, the plaintiff was fully advised of this right, and the defendant, in good faith, offered to give him the information which he sought, which would have borne upon the question of the value of the stock, so far as such information was within the defendant's possession, and the defendant offered to show him statements, such as were accessible, for the information of stockholders, but the plaintiff saw fit not to avail himself of these means of information, and the arbitrators all concurred in finding the means of information open and accessible to the plaintiff, which would have enabled him to decide for himself whether he would abide by his contract, or declare it void. The arbitrators very justly remark in this opinion, and state the equitable doctrine applicable to these facts, as follows: "While he (the plaintiff) may have had a right to rescind,

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he was not at liberty to play fast and loose with the defendant in the matter, nor to wait and see whether subsequent changes in the value of the stock made it for his interest to rescind or to let the purchase stand, and to govern his actions accordingly." "This," they say, "is a just and inflexible rule and applied with especial force to transactions in securities of a fluctuating character, such as was the stock in question." Proceeding, they say, "The plaintiff was bound to make his election promptly. He did not do so, but waited about two years, when he commenced this action. We are of opinion that whatever right to rescind he ever had had then expired by reason of his not having within a reasonable time made his election and notified the defendant thereof," thus all concurring in sustaining this defense interposed by the defendant to the cause of action which the arbitrators had found existed in plaintiff's favor.

Then, to briefly recapitulate. As to plaintiff's first ground of recovery, that this contract was voidable at the time it was entered into because of the defendant's actual fraud, inducing the plaintiff to make the sale, the arbitrators all concurring, decided against the plaintiff.

As the plaintiff's second, and only other ground of recovery, that this contract was voidable at the time it was entered into because of the relationship of trustee and *cestui que trust* existing between the plaintiff and the defendant, which gave to the defendant an unlawful advantage over plaintiff, the arbitrators all concurred in deciding in favor of the plaintiff.

As to the defendant's first defense that he did not have such advantage over plaintiff, either in knowledge or means of knowledge, or by reason of value of stock or price paid, the arbitrators all concurred in deciding that this defense could not prevail against the plaintiff, because the evidence had not satisfied a majority of them, and all did not concur therein.

As to the second defense of the defendant, that plaintiff, by reason of his delay in determining whether he would abide by the contract or annul it, he had lost his right then to rescind the same, the arbitrators all concurring decided in favor of the defendant. Thus all the arbitrators concurring in the determination of every material fact necessary to sustain an award, which would be conclusive as to all the issues between the parties in this case. It is claimed, however, that in holding that, by allowing two years to elapse between the time the plaintiff had knowledge of his right to rescind and the rescission of the contract, he lost his right, the arbitrators have clearly erred against the plaintiff, as the statute of limitations gives four years in which to bring the action. I had supposed that the difference between the doctrine of laches in equity and the statute of limitations was too well understood to require any comment and consideration. As I have already said, so far as the findings of law and fact are concerned, this court has no power whatever

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to review them, but it is perfectly apparent that one of these doctrines applies to the time within which the party is to take advantage of his right to put an end to a contract and rescind the same, while the statute of limitations, fixes the time within which he must bring his action to enforce that rescission, if such action is necessary. Upon the notification by one party to another of a rescission of a contract because of the infirmities in the inception of the contract, such as were alleged in this petition, the party thus notified has two courses he may follow. He may either join with the other party in the contract in restoring each to their original condition, or he may refuse and have a court adjudicate and pass upon either right. The two things have no other relation, one to the other. The statute fixes four years in which this action must be brought, and that is an arbitrary time with no variation, while equity determines the length of time within which such notification must be made, and what lapse of time constitutes fatal laches, by consideration of the subject-matter of the contract, and relations of the parties and the facts concerning the particular transaction; and this period is not arbitrary nor fixed, but changes with the circumstances of each particular case.

For these considerations, in my judgment, the defendant should have the final order, and judgment in his favor entered in this case, which is prayed for in the supplemental answer, and which is found in his favor by these arbitrators in their award.

Judge Stevenson Burke and W. H. Poppleton, for plaintiff.

Kline, Carr, Tolles & Goff, for defendant.

UNDUE INFLUENCE.

[Superior Court of Cincinnati, Special Term, September 1900.]

* DAVID G. EDWARDS, ADMR., v. JOHN C. DALLER.

UNDUE INFLUENCE—LIMITATION OF ACTION.

A cause of action arising from undue influence over a weak mind does not accrue, within the meaning of the statute of limitations, until after the removal of the influence.

Heard on demurrer to petition on two grounds, that more than four years have elapsed since cause of action arose, and that the facts do not constitute a cause of action.

DEMPSEY, J.

As to the first ground, without passing upon the question whether the four years' limit applies, it is sufficient to say that undue influence exercised over a weak and incapable mind is the charge made, which influence was continued during the lifetime of Mrs. Oskamp.

* For another decision in this case, see *post*.

Edwards v. Daller.

A cause of action, under such circumstances, it seems to me would not accrue until the cessation or removal of the baleful influence, which, in this case, was not accomplished until death intervened; or to assimilate it to the topic "fraud" provided for in the statute, and consider it a species of fraud, and the statute would not run until discovery made, and the discovery made in this case was not until after the influence ceased, *i. e.*, by death.

That the facts are sufficient to warrant the interference of equity, our precedents justify *Tracey v. Sackett*, 1 Ohio St., 54; *Reid v. Burns*, 13 Ohio St., 49; *Baugh v. Buckles*, 1 Circ. Dec., 607.

Demurrer overruled.

Harlan Cleveland, for demurrer.

Chas. W. Baker, contra.

[NOTE BY THE COURT—Since writing the foregoing opinion, an examination of the books confirms the court's judgment as to the time when the statute begins to run: "Time does not begin to run so as to bar the remedy * * * in cases where the transaction has taken place under pressure or the exercise of undue influence until the aggrieved party is emancipated from the dominion under which he stood at the date of the transaction. * * * The objection of time is removed so long as the dominion or undue influence which vitiated the transaction is in full force." Kerr on Fraud, 311, and cases: *Oldham v. Oldham*, 5 John q. Case, N. C., 89, 92; *Lowland v. DeFaria*, 17 Vesey, 25; *Sharp v. Leach*, 31 Beavan, 491, 503.]

MUNICIPAL CORPORATIONS—SALE OF GAS PLANT.

[Lucas Common Pleas, May 9, 1900.]

* *KERLIN BROTHERS COMPANY v. TOLEDO*.

1. EXPIRATION OF TERMS OF COUNCILMEN BEFORE COMPLETION OF CONTRACT.

An ordinance, granting a franchise to operate a natural gas plant, where the terms of eight members of the council expired before it was finally passed and the terms of fifteen other members expired before it could take effect by publication, is void under sec. 1891, Rev. Stat., whereby a council is prohibited from entering into a contract which is not to go into full operation during the term for which all members were elected.

2. ACCEPTANCE OF CONDITIONAL BID—INDIVISIBLE CONTRACT.

Under a bid for a natural gas plant, owned by a municipal corporation, which offered a certain sum for that part of the plant outside the city, a certain sum for that part lying within the city and a third sum for the whole plant, upon condition that "the city * * * if the undersigned so elect, will grant them by ordinance, satisfactory to them, the right to continue to operate said city natural gas plant * * * also fixing, satisfactory to them, the price they may charge consumers for gas," with the following further provision "the amounts bid to be paid in case of the acceptance of this bid or any part thereof within twenty days after the passage and legal publication of the ordinances and resolutions conveying the property to the undersigned and granting to them the right to furnish gas, fixing the price, etc., above referred to," the conditions attach to the bid for the inside part of the plant, and an acceptance of the bid, without qualification, for the inside part of the plant and the passage of the franchise and gas rate ordinances, are indivisible parts

* For decision of the circuit court in this case, see 11 Circ. Dec., 56.

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of one transaction ; and, therefore, the contract of sale of the inside part of the plant was not completed until the passage of the franchise and gas rate ordinances ; and where the contract was not so completed and could not go into full operation during the term for which all members of the council were elected, all proceedings relative to a sale of the inside part of the plant are void.

3. WHERE PART OF PROPERTY IS REAL ESTATE—SALE—BIDS.

Where part of a natural gas plant consists of real estate, and the council offers it for sale as an entirety, in order to make a valid contract, it is necessary to proceed under sec. 2673a, Rev. Stat., requiring advertisement for bids; and in order to secure free and fair competition the bids should respond to the advertisement.

4. CONTRACT UPON CONDITIONAL BID UNLAWFUL.

Where the bidders included in their bid the granting of an ordinance fixing satisfactorily to themselves the price they should charge for gas, and such ordinance was not mentioned in the advertisement for bids, there was no competition as to that ordinance and it was not competent for the council to enter into a contract based on such a bid.

5. SALE OF GAS PLANT—ACTION OF COUNCIL NECESSARY.

Where a natural gas plant owned by a municipal corporation is offered for sale, which must be made under sec. 2673a, Rev. Stat., some action of the council, by order, resolution or ordinance, indicating an intention to offer the plant for sale, is necessary, inasmuch as, by express terms of the statute cited, the offer can be made only upon vote of three-fifths of the members of the council.

6. RESOLUTION TO RECEIVE BIDS—OF GENERAL AND PERMANENT NATURE.

A resolution directing the city clerk to advertise for bids for a natural gas plant, considering the nature of the subject matter (which is the correct test) and the fact that such resolution was the only action of the council indicating an intention to offer such property for sale, is a resolution of both a general and a permanent nature, within the meaning of sec. 1694, Rev. Stat., requiring, unless rules are suspended, a reading on three different days; and a failure to comply with that section renders the sale invalid.

7. SALE NOT COMPLETE UNTIL DELIVERY—RATIFICATION—ESTOPPEL.

Neither the payment into the city treasury of the purchase price of the outside part of the plant, nor the resolution of the council directing the gas trustees to deliver the property to the purchasers, constitutes a defense to an action, under sec. 1777, Rev. Stat., prosecuted for the benefit of tax-payers, proceeding upon the theory that the city is abusing its corporate powers, or is about to execute a contract in violation of law; until the property is delivered to the company the transaction is not completed and if the contracts are illegal no question of estoppel can arise.

8. REMEDIES TO ENJOIN SALE.

While it would have been proper for the city solicitor, under the facts stated, to have included in his action in behalf of taxpayers the whole plant, and to have asked for an injunction against the prosecution of a replevin suit brought by the purchasers to recover the outside portion of the plant until the validity of the sale should be determined, it is also proper for the city solicitor to bring an action for injunction as to the sale of the inside portion of the plant and file a cross petition in the replevin suit, as an application under sec. 1777, Rev. Stat., and, after setting out proceedings of the council, ask for an injunction restraining the purchaser from taking possession and that the sale be declared void.

9. PUBLIC OFFICERS CANNOT SUE UNLESS AUTHORIZED.

Public officers, as such, have no right to bring suits in their own names, unless authorized to do so by statute; and as the statute nowhere gives natural gas trustees such authority, they have no power to bring suit to enjoin the sale of a natural gas plant belonging to the corporation.

Kerlin Brothers v. Toledo.

10. PUBLIC OFFICERS NOT TRUSTEES OF EXPRESS TRUST.

While public officers may be designated as trustees, or directors, or agents, they are not in any sense trustees of an express trust. Natural gas trustees, therefore, have no authority, by virtue of sec. 4995, Rev. Stat., providing that the trustee of an express trust may bring an action without joining the person for whose benefit the suit is prosecuted, to bring suit to enjoin the sale of a natural gas plant by the corporation.

11. INJUNCTION AGAINST PROSECUTION OF REPLEVIN SUIT.

In the ordinary action of replevin, where the property is confessedly personal, and is susceptible of delivery by the officer to the plaintiff on the giving of a bond, or by the officer to the defendant on the giving of a counter bond, and where all the grounds for equitable relief which the defendant has, he may set up as a defense in the replevin suit, he has an adequate remedy at law and injunction will not lie. But where the question whether the property is real or personal is in dispute, as in case at bar, and where the property, consisting largely of pipes buried in the ground, cannot be appraised, examined and delivered without severing the plant and cutting off the supply of gas, it ought not to be treated as personal and detached by the officer holding the writ of replevin until the right to an injunction is determined. And while the injunction prayed for in the cross-petition restraining the plaintiff from taking possession of the property may in effect include a suspension of the replevin proceedings, yet under the prayer for general relief the injunction should be made broad enough to include a stay of all proceedings in the replevin action.

PUGSLEY, J.

Three actions, have been brought in this court, which involve the question as to the validity of the sale or attempted sale of the Toledo natural gas plant, made by the city of Toledo to the Kerlin Brothers Company. The first of these actions in the order of commencement is No. 45,836—the case of Kerlin Bros. Co. v. Toledo, which was begun on April 11. This is an action of replevin. It was brought to recover possession of the personal property used or connected with the Toledo natural gas plant which lies outside the city of Toledo. The plaintiff alleges in its petition that it is the owner and entitled to the immediate possession of said property, and that the same is wrongfully detained by the defendant. The defendant, the city of Toledo, through the city solicitor, has filed an answer and cross-petition, in which it sets out the various proceedings had and taken with reference to the sale of the gas plant. The cross-petition concludes with this prayer:

"Wherefore defendant prays that plaintiff, its agents and servants, may be temporarily restrained from in any manner taking possession of the property described in plaintiff's petition or any part thereof, and be further enjoined and restrained from accepting the said ordinance pretended to have been granted by the common council of the city of Toledo conferring a gas franchise on plaintiff, and from in any manner doing any act or acts with the intent of rendering the said pretended ordinance a valid contract between the city of Toledo and plaintiff; and that upon the final hearing of this cause plaintiff's petition be dismissed, and said temporary restraining order or orders be made perpetual, and that said pretended sale of the property described in plaintiff's petition or any part thereof, and said pretended grant of said gas rights and franchise and all proceedings had in connection therewith or in relation

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thereto, be declared null and void and of no force or effect; and this defendant prays for such other, further and different relief as equity and good conscience may require."

The second action is No. 45,845, commenced on April 13, and was brought by the city of Toledo, the three members of the board of natural gas trustees of the city, and the mayor of the city against the Kerlin Brothers Company and others. The prayer of the petition in this case is in part that the Kerlin Brothers Company be enjoined from prosecuting their said replevin action, and from taking possession of any part of the property described therein, and from interfering with the city's possession of said natural gas plant, and from accepting the said franchise ordinance. On the filing of this petition an order was issued restraining the defendants as prayed for until a motion for an injunction should be heard and determined, and which motion was filed at once.

The third action is No. 45,876, begun on April 19. It was brought by Moses R. Brailey, city solicitor, in the name of the city of Toledo, against the city of Toledo and others. The prayer of the petition in this case is in part that the Kerlin Brothers Company be enjoined from taking possession of that part of the natural gas plant lying inside of the city, and the real estate connected with the gas plant lying outside of the city, and also from accepting the said franchise ordinance. This action was brought under sec. 1777, Rev. Stat., which reads as follows:

"He (that is, the city solicitor) shall apply in the name of the corporation, to a court of competent jurisdiction for an order of injunction to restrain the misapplication of funds of the corporation, or the abuse of its corporate powers, or the execution or performance of any contract made in behalf of the corporation in contravention of the laws or ordinances governing the same, or which was procured by fraud or corruption."

In this same connection I will read sec. 1778:

"In case he fail (that is, the city solicitor) upon the request of any taxpayer of the corporation to make the application provided for in the preceding section, it shall be lawful for such taxpayer to institute suit for such purpose in his own name, on behalf of the corporation; provided, that no such suit or proceeding shall be entertained by any court until such request shall have first been made in writing."

I will say that the cross-petition which was filed by the city solicitor in the replevin case was also filed under sec. 1777.

These three actions which I have thus briefly described were heard together upon the pleadings and upon the admitted facts, and were submitted to the court for a final decree in each case. The questions involved are numerous and important, and they have been fully and ably argued by counsel for the several parties. I have given to these questions, and to all of them, such consideration as their importance seemed to demand, but in what I have to say I will undertake to discuss

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only a few of them—such questions as seem to me to be vital and controlling.

A good deal was said in the argument as to the advisability of selling the gas plant and as to the benefit as claimed on one side, and the detriment, as claimed on the other side, that will accrue to the city from the sale as made or attempted to be made. Of course, as counsel understand, this is a matter over which the court has no control. The advisability of selling the gas plant and the policy to be pursued are matters which are properly and necessarily vested in the discretion of the common council, with which the court has no power to interfere. The question which is submitted for decision, and the only question is, in brief, whether there are such defects or irregularities in the proceedings of the common council as will warrant the court, under all the facts of the case, in enjoining the performance or carrying out of the contracts of sale. Matters of expediency or wisdom, or want of wisdom in the action of the council cannot affect the judgment of the court upon purely legal questions.

The first official step looking towards a sale of the gas plant was the passage by the council upon October 9, 1899, of a resolution which reads as follows:

"Resolved by the common council of Toledo, that the city clerk be instructed to advertise for bids for the sale of that part of the city of Toledo natural gas plant lying outside of the city of Toledo. Bids will be received separately on that part lying within the city and that part lying outside of the city."

This resolution was passed by each board of the council, was vetoed by the mayor, and subsequently passed by each board over the veto. Thereupon the city clerk published a notice for bids, which reads as follows:

"Notice—Proposals for the Sale of the City Natural Gas Plant.

"Sealed proposals will be received at the office of the city clerk of the city of Toledo, by the undersigned, up to 12 o'clock (standard time) M., of Monday, the fourth day of December, 1899, for the purchase of the separate parts of the city natural gas plant as hereinafter mentioned, together with all its appurtenances, including all pipes and connections laid in the city of Toledo, Ohio, pipe lines and connections elsewhere, together with all wells, rights in wells, tubing, and all machinery, appliances, tools, materials, lands, leases and leasehold interests, now owned and held by the said city in connection with its natural gas plant, with the right to lay down and maintain and operate in the streets, alleys and public places of said city, gas pipes and their connections, for the purpose of supplying natural and manufactured gas to consumers in said city. The purchaser to assume all the obligations pertaining to said property and leases, from and including the date of purchase.

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"Separate bids only will be received for that part of the natural gas plant lying within the city, and for that part of the natural gas plant lying outside of the city. Intending bidders can obtain a description of all of said gas property owned or controlled by the city of Toledo by calling upon the undersigned."

Then follows the requirement that a certified check shall be deposited with the clerk with the bid.

"The city reserves the right to reject any and all bids which may be offered.

"By order of the Common Council.

"Wm. O. Holst, City Clerk."

Subsequently, upon December 4, 1899, two bids were filed in the office of the city clerk, one of which was by the Kerlin Brothers Company as follows; and as a good deal depends upon this bid, and the construction to be given it, I will read the whole bid:

"TOLEDO, OHIO, December 4, 1899.

"To the Hon. Common Council of the City of Toledo:

"GENTLEMEN: In response to your published invitation for bids, a copy of which is hereto attached, the undersigned will pay for all that part of the property of said city of Toledo (as advertised) owned, used or connected with the city natural gas plant, as described in said advertisement and shown by description mentioned in said advertisement, and lying outside of the city, the amount of \$102,000, and will pay for that part of the property of said city of Toledo (as advertised) owned, used or connected with the city natural gas plant as described in said advertisement, and lying within the city, the sum of \$126,000. Or will pay for the whole of said natural gas plant, and all parts and parcels thereof, whether lying within or without said city, and as described in said advertisement and as shown by the description in said advertisement, the sum of \$228,000.

"This bid is made upon the following express condition: That the city of Toledo, Ohio, if the undersigned so elect, will grant them by ordinance satisfactory to them, the right to continue to operate said city natural gas plant, and to take up the same, and to lay down and maintain gas pipes and their connections, and all necessary appliances to enable them to continue the supplying of gas to consumers in said city, in the same manner as is now done and proposed to be done by the present operation of said plant. Also fixing satisfactory to them the price they may charge consumers for gas.

"The undersigned to assume only such obligations as arise from and after the date of purchase, but not to be liable for any obligations that have or may accrue or arise before said date.

"The amounts bid to be paid in case of the acceptance of this bid, or any part thereof, within twenty days after the passage and legal pub-

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lication of the necessary ordinances and resolutions conveying said property to the undersigned and granting to them the right to furnish gas, fixing the price, etc., above referred to.

"A certified check on the National Bank of Commerce of Toledo, Ohio, for the sum of \$15,000, payable to the order of said city, deposited herewith.

"Respectfully submitted,

"THE KERLIN BROTHERS COMPANY,

"By E. M. Kerlin, Secretary."

The other bid is by Charles D. Hauk, and is as follows:

"To the Honorable Council of the City of Toledo:

"I, the undersigned, Charles D. Hauk, hereby bid for the property of the natural gas plant department, under your printed notice for 'Proposals for the sale of the natural gas plant of the city of Toledo, Ohio,' as follows:

"For said property lying inside of the city limits, including franchises, \$115,000; for said property lying outside of the city limits, \$90,000; for the entire property, including franchises, \$205,000. Said property is shown by a schedule hereto attached marked 'A.'

"I hereby enclose my certified check for \$15,000, as required by said printed notice.

"CHARLES D. HAUK.

"Toledo, Ohio, December 4, 1899."

Thereafter, on December 11, 1899, separate resolutions were introduced into the board of councilmen and passed by that board upon said day, which resolutions accepted the bid of the Kerlin Brothers Company. One of these resolutions I will read, and that will be sufficient:

"Resolution accepting the bid of the Kerlin Brothers Company for gas plant lying outside of the city of Toledo.

"Resolved by the common council of the city of Toledo, Ohio, that the proposal of the Kerlin Brothers Company for the purchase of all that part of the property (as advertised) owned, used or connected with the city natural gas plant, lying outside of the city of Toledo, with its appurtenances, including all mains, pipes, gas and oil wells, gas and oil leases, meters, materials, machinery, land and appliances appertaining or belonging to said plant, or used in connection therewith, at the price of \$102,000 be and the same is hereby accepted, and upon the payment of the purchase money, the mayor and city clerk are hereby authorized and directed to execute and deliver to said The Kerlin Brothers Company, proper deeds and conveyances of all said property."

The other resolution is similar, except that it is the acceptance of the bid of the Kerlin Brothers Company for that part of the gas plant lying inside of the city, at the price of \$126,000.

These resolutions were subsequently passed by the board of aldermen. Each was vetoed by the mayor, and each was subsequently passed by both boards over the veto—the resolution as to the outside part on January 8, 1900, and the resolution as to the inside part on February 7.

On February 26, the Kerlin Brothers Company caused to be prepared and introduced in the board of aldermen two ordinances, one of which is called the "franchise ordinance," the other fixing the price of gas to be charged by the said company, which is called "the rate ordinance." The franchise ordinance is entitled as follows:

"An ordinance granting unto the Kerlin Brothers Company of Toledo, Ohio, the right and privilege to erect, lay, maintain and operate a gas plant, together with the necessary gas pipes, and other appurtenances in the city of Toledo, for the purpose of supplying the inhabitants thereof with natural and manufactured gas for illuminating, heating and power purposes, and providing for the purchase of said gas plant, pipes, etc., by the city of Toledo, Ohio."

This ordinance contains numerous provisions. I will not stop now to read them, but may have occasion hereafter to refer to some of them. This ordinance was adopted by the board of aldermen on February 26, the day it was introduced, and by the board of councilmen on March 5. It was vetoed by the mayor, and on March 28 was adopted over the veto by the board of aldermen. On April 5, the ordinance was considered by the board of councilmen, but it failed of adoption over the mayor's veto. Thereafter, at a special meeting of the board of councilmen, on April 11, upon a reconsideration, the ordinance was adopted by that board. The history of the rate ordinance from the time it was introduced into the board of aldermen on February 26, is the same as that of the franchise ordinance, except that at the special meeting of the board of councilmen on April 11, it failed of adoption over the mayor's veto. On March 9, which was after both of these ordinances had passed both boards of the council and were in the hands of the mayor, the Kerlin Brothers Company filed this written communication with the common council:

TOLEDO, OHIO, March 9, 1900.

"To the Honorable Common Council of the City of Toledo, Ohio:

"GENTLEMEN: The undersigned, The Kerlin Brothers Company, of Toledo, Ohio, hereby give you notice that they have accepted and do hereby accept the terms and conditions of certain legislation passed by your honorable body on January 15, 1900, selling to them all that part of the property of the city of Toledo, owned, used or connected with the city natural gas plant, lying outside of the city of Toledo, with its appurtenances, including all mains, pipes, gas and oil wells, gas and oil leases, meters, materials, machinery, lands and appliances appertaining or belonging to said plant or used in connection therewith as described in said legislation.

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"We hereby waiving any conditions in our bid, expressed or implied, as to the sale of the property above described, which may require the granting to us of a franchise to sell gas in the city of Toledo, and fixing the price thereof.

"Very respectfully yours,

"THE KERLIN BROTHERS COMPANY,
"By R. G. KERLIN, President."

On the next day (March 10), the company paid to the city treasurer the sum of \$102,000, and took from the treasurer the following receipt:

"CITY TREASURER'S OFFICE.

"TOLEDO, OHIO, March 10, 1900.

"Received from the Kerlin Bros. Co. to be placed to the credit of sinking fund, one hundred and two thousand and 00-100 dollars (\$102,000.00), for purchase of gas plant (outside).

"Jos. L. YOST, Treasurer.

"F. S. HODGMAN, Deputy."

On April 5, the council passed this resolution:

"Resolved by the common council of Toledo. That the common council of Toledo, having by proper legislation, sold to the Kerlin Brothers Company all that part of the natural gas plant of said city lying outside of said city, described in said legislation at and for the sum of one hundred and two thousand dollars. And said The Kerlin Brothers Company having paid into the treasury of said city said sum of \$102,000, and the same having been accepted by said city, and the said The Kerlin Brothers Company being now the owner of said described property, and the said city is incurring great damages; therefore the natural gas trustees of the city of Toledo are hereby authorized and directed to surrender and deliver possession of all of said property, including all real estate included therein, to said The Kerlin Brothers Company.

"And the city clerk is directed to send a copy of this resolution to said natural gas trustees at once upon its passage."

This is substantially a statement of all the proceedings that I shall have occasion to refer to.

The first objection which I will notice is the one relating to the franchise ordinance. It is claimed that under and by virtue of sec. 1691, Rev. Stat., the contract or proposed contract evidenced by this ordinance never went into operation, and cannot now be legally enforced. Section 1691 reads as follows:

"The council shall not enter into any contract which is not to go into full operation during the term for which all the members of the council are elected."



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By sec. 1695 it is provided that—

" By-laws, resolutions and ordinances shall be authenticated by the signature of the presiding officer and clerk of the council. Ordinances of a general nature, or providing for improvements shall be published in some newspaper of general circulation in the corporation. * * * No ordinance shall take effect until the expiration of ten days after the first publication of such notice."

Section 11 of the franchise ordinance itself reads as follows :

" This ordinance shall take effect and be in force from and after its passage and legal publication, and the written acceptance of the terms and conditions hereof by the said The Kerlin Brothers Company filed with the city clerk of said city. This ordinance and the acceptance to constitute a binding contract between said city and said company, its successors and assigns, and the terms hereof shall not be changed without the consent of both parties."

As I have said, this ordinance was finally passed by the board of aldermen over the mayor's veto upon March 28, and by the board of councilmen over the mayor's veto on April 11. The term of office of eight members of the board of aldermen who were in office March 28, expired April 9, and the term of office of fifteen members of the board of councilmen who were in office April 11, expired on that day. It thus appears that the term of office of eight members of the common council expired before the ordinance was finally passed, and that the term of office of fifteen other members of the common council expired before the ordinance could take effect by publication, and that therefore the contract evidenced by the ordinance did not and could not go into operation during the term for which all the members of the council were elected ; and by sec. 1691, Rev. Stat., the council is prohibited from entering into such a contract. So far, then, as the franchise ordinance standing by itself is concerned, I know of no reason, and as I understand, no reason has been urged, why sec. 1691, Rev. Stat., does not apply. Under that section the ordinance was in contravention of law and void, and injunction will lie at the suit of the city solicitor, under sec. 1777 to restrain its publication and acceptance, and all proceedings thereunder.

A more important question remains. It is claimed by the city solicitor and those united with him that the franchise ordinance and the resolutions accepting the bids for separate parts of the plant are parts of one and the same transaction, and that until the whole is completed by the legal passage of the ordinance, the company has acquired no right to the property. It is contended on the other hand by the company that the franchise ordinance stands by itself, and was enacted without reference to and independently of the sale of the property or the acceptance of their bids for the property. This requires a consideration of all the proceedings that were taken after the bid of the company was made. In the bid of the company they first offer \$102,000 for the part of the plant lying

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outside of the city. They next offer \$126,000 for the part lying within the city. They then offer for the full plant \$228,000, which is the sum total of the amounts offered for the parts separately. They then say: "This bid is made upon the following condition." Then follows the condition which I have read. It is said by counsel for the company that the words "this bid," refer only to the offer immediately preceding, namely, the offer of \$228,000 for the whole plant; and that the condition does not apply, does not attach, until that offer for the whole plant or when that offer for the whole plant is accepted. There seems to be nothing on the face of Kerlin's proposal which limits the words "this bid" to any particular offer. But if there is any doubt about it, it is entirely removed by what follows. After giving the conditions, they say this:

"The amounts bid to be paid in case of the acceptance of this bid or any part thereof, within twenty days after the passage and legal publication of the ordinances and resolutions conveying said property to the undersigned, and granting them the right to furnish gas, fixing the price of gas, etc., above referred to."

It thus appears that it is proposed by the company, if any part of their bid is accepted, the amount of the bid is not to be paid until after the necessary ordinances are passed granting them the various rights stipulated for in the condition, and fixing the prices which they may charge for gas. Can there be any doubt, then, that the condition is attached to whatever part of their bid is accepted, provided it is applicable to such part of their bid? I do not think it applies to their bid for the outside part of the plant, because it could not have been in the contemplation of the parties that in buying the outside part alone they were to get a franchise for a gas plant within the city. This distinction was probably in the mind of the other bidder when he made his bid, for he bids a certain sum for the inside part including franchises (meaning undoubtedly the franchise mentioned in the clerk's notice), and he bids a certain sum for the whole plant, including franchise, and then he bids a certain sum for the outside part, saying nothing about franchise. It seems clear however, that the company bid for the whole plant and for the inside part of the plant on condition that if they shall elect, the city will grant to them by ordinance the right to continue to operate the city natural gas plant, and fixing the price which they may charge consumers for gas satisfactorily to themselves. This is the plain reading of their bid. The council then passed a resolution accepting without qualification the bid of the company for the inside part as made, thereby saying in effect: "We accept your bid, and will give you the ordinance mentioned in the condition, if you shall so elect." No other construction, as it seems to me, can be put upon the resolution of acceptance. Hence the purchase price was not payable, and the transaction of sale was not completed until after the passage and due publication of the ordinances if they should elect to have ordinances. The company did elect to take the ordinances,

for they themselves caused to be prepared and introduced into the council such ordinances as they desired, one for the franchise and the other fixing the price of gas. The franchise ordinance as introduced and passed I think, shows upon its face that the sale was not to be considered as complete until the ordinance should be passed. Sec. 9 of the ordinance is as follows:

"In the event said city shall exercise its right to purchase said property as provided in sec. 7 of this ordinance, the price to be paid for said property by said city shall be arrived at as follows:

"The purchase price that said The Kerlin Brothers Company are to pay to the city of Toledo for its present gas plant lying within the limits of said city, to-wit: the sum of \$126,000, less the reasonable value of any part of said present plant which may be removed or destroyed, and, plus the cost of all additions, acquirements, improvements, extensions and betterments, including the cost of erection of the plant for manufacturing gas that may be added from time to time, shall be the price which the said city of Toledo shall pay for said plant."

It is thus said in this section, which speaks of course as of the date of its passage, that the gas plant is still the gas plant of the city, and that the company was yet to pay the purchase price, and by the terms of the bid of the company that was accepted by the city, the purchase price was not payable until twenty days after the passage and legal publication of the necessary ordinances granting the right to furnish gas and fixing the price. There was no action of the council, and nothing in the conduct of the parties, to indicate any change in the understanding and agreement that the company was to have these ordinances before the purchase price was payable. My conclusion is, that the acceptance of the company's bid for the inside part of the plant and the passage of the franchise ordinance as well as of the gas rate ordinance, were indivisible parts of one transaction, and that the contract of sale of the inside part was not completed and could not be completed or go into operation during the term for which all the members of the council were elected; and therefore, under sec. 1691, Rev. Stat., that all the proceedings relative to the sale of the inside part of the plant are void. No question arises as to a waiver by the company of the conditions attached to the sale of the inside part of the plant, because no waiver was made or attempted until after the passage of the franchise ordinance, and in fact not until after this litigation had begun. If a new contract was to be made between the city and the company, proceedings must be begun *de novo*.

I will consider another claimed irregularity, which relates only to the sale of the inside part of the plant. In the clerk's published notice, bids were invited for the purchase of the gas plant together with the right to lay down and maintain and operate in the streets, alleys and public places in said city, gas pipes and their connections, for the purpose of supplying natural and manufactured gas to consumers in said

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city. The Kerlin Brothers Company bid for the inside part of the plant the sum of \$126,000, on condition that if they should so elect, the city would grant them by ordinance satisfactory to them the right to continue to operate said city natural gas plant, and also fix satisfactorily to them, the price they might charge consumers for gas; and the council accepted their bid as so made. The bid and acceptance were considerably broader than the clerk's notice, and included one matter at least which was not mentioned in the notice, namely, the right of the bidders to have, if they shall so elect, an ordinance fixing satisfactorily to themselves the prices they shall charge consumers for gas. The claim is that the city had no right to make such a contract or to accept such a bid, and that varying as it does so materially from the advertisement for bids, the contract is contrary to law and void. The only statute which prescribes the manner in which a sale of corporate property shall be made, is sec. 2673a, Rev. Stat., which reads as follows:

"That the council of any city or village, which has not a board of improvements, or board of public works, shall have power, three-fifths of all the members elected thereto voting therefor, to offer for sale or lease any real estate and appurtenances belonging to such city or village, and place the proceeds arising therefrom to the credit of such fund or funds as to said council may seem proper; provided, that invitation of written bids for such sale or lease shall be first published for two weeks in some newspaper of general circulation in such city or village, and the sale or lease shall be awarded to the highest and best bidder, but all bids may be rejected."

The first question that arises is whether this section applies to this case; in other words, whether, among other things, it was necessary in this case to advertise for bids in offering this plant for sale. It will be noticed that the statute speaks only of the sale of real estate and appurtenances. It is contended on the one side that the entire gas plant, consisting of gas wells, pumping stations, lines of pipe buried in the ground, land, buildings, leasehold interests and their attachments, is real estate and appurtenances within the meaning of this section. On the other side, it is contended that, with the exception of the land which is owned by the city in fee, the entire plant is personal property. This is an important question. I do not consider it necessary to decide it, because it is admitted that a part of the plant is real estate, and to sell that part it was clearly necessary to advertise for bids. Inasmuch as the council offered for sale the plant as an entirety, real estate and all, except as it is divided by the city line, I am of the opinion that in order to make a valid contract of sale of the plant as offered, it was necessary to proceed under this section. The real estate was an integral part of the plant as offered for sale and sold. Any action or omission of the council that will vitiate the sale of the real estate must vitiate the sale of the plant of which the real estate is a part. In order to secure a free and fair compe-

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tition among bidders, it is necessary that the bids shall respond to the advertisement. It is familiar law governing contracts by public officers that a valid contract can be founded only on a competitive bid. Here the Kerlin Brothers Company went beyond the advertisement and included in their bid the granting of an ordinance fixing satisfactorily to themselves, the price they should charge for gas; an important right not mentioned in the advertisement and presumably unknown to the bidders. As to that ordinance there was no competition. Under the authorities it was not competent for the council to enter into a contract based on such a bid. In Pease v. Ryan, 3 Circ. Dec., 654, it was held that under a statute which requires public officers to make plans and specifications for improvements and advertise for proposals for making the same, and to contract with the lowest bidder, it is not competent for them to award the contract to one whose proposal is for materials not mentioned in the specifications and advertisement, as such proposal is not competitive, and the performance of a contract based on such proposal will be enjoined under secs. 1777 and 1778, Rev. Stat. To the same effect are Lake Shore Foundry v. Cleveland, 4 Circ. Dec., 280; Miller v. Pierce, 2 Cin. S. C. R., 44; Brady v. Mayor, 20 N. Y., 316. For this reason also I think that the contract for the sale of the inside part of the plant was void.

There is another objection to the sale of the inside part of the plant which is entitled to serious consideration, but which I shall not stop to discuss; and that is, whether a contract is valid which gives to the Kerlin Brothers Company the right to fix the price which they may charge for gas to suit themselves. It is settled law that a municipal corporation cannot delegate its legislative powers. The power to regulate the price of gas is vested by law in the common council for the public benefit, and cannot be delegated to others. The objection is, that in accepting the bid of The Kerlin Brothers Company for the inside part of the plant, which was upon the condition of their having the ordinance fixing the price which they may charge for gas satisfactorily to themselves, the council wrongfully attempted to abdicate its control over a matter which is held by it in trust for the benefit of the public, and that a contract so made, for that reason is void.

Another objection made to the regularity of the proceedings of the council, and which relates to the sale of both parts of the plant, is that the resolution directing the clerk to advertise for bids was not passed in the mode prescribed by law. The resolution was read in each board of the council on only one day, and without a suspension of the rules which require a reading on three different days. Section 1694, Rev. Stat., reads as follows :

" By-laws, resolutions and ordinances of a general or permanent nature shall be fully and distinctly read on three different days, unless three-fourths of the members elected dispense with the rule; and the

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vote on such suspension shall be taken by yeas and nays, separately on each by-law, resolution or ordinance, and entered on the journal."

The claim is that this resolution was of a general or permanent nature, and not having been passed in the manner prescribed by sec. 1694, it was illegal and void. The first question arising is, whether any resolution was necessary. I have already held that the plant being offered as an entirety, and consisting in part of real estate, sec. 2673a applied. That section gives to the council the power to offer for sale real estate and appurtenances belonging to the city, provided an invitation of bids is first published. In offering the property for sale some action of the council is necessary, either by order or resolution or ordinance, because, by the express terms of the statute, the offer can be made only upon the vote of three-fifths of the members of the council. In this case the only thing done to indicate the offer was the passage of the resolution directing the clerk to advertise for bids and the publication by the clerk of the notice to bidders. It may be that something more was required on the part of the council to constitute an offer of the property for sale, within the meaning of sec. 2673a, but a resolution or something in the nature of a resolution, upon which a vote of the council could be taken, indicating the intention of the council to offer the property for sale, was necessary.

The next question is, whether the resolution was of a general or permanent nature. When this matter was first presented I was very strongly of the impression that a resolution simply directing the clerk to advertise for bids could not be regarded as a resolution of a general or permanent nature, but after considering the nature of the subject matter to which the resolution relates, which, according to the authorities, is the test, and upon considering the fact that the resolution was the only action of the council indicating an intention to offer the property for sale, and especially after examining the recent decisions of the Supreme Court in analogous cases, I can come to no other conclusion than that the resolution is one of both a general and permanent nature, within the meaning of sec. 1694. I will first refer to some of the decisions. In the case of Campbell v. Cincinnati, 49 Ohio St., 463, an action was brought to enjoin two assessments, one to pay for property condemned to open a street, and the other to pay the cost of grading and macadamizing the street. Both ordinances, the one for appropriating the property and the other for improving the street, were passed after a suspension of the rules which required a reading on three different days, but at the same time on one vote and one roll-call of yeas and nays the rule was suspended as to other ordinances of a similar character, so that in order to determine whether this was legal, it was necessary to find whether the ordinances were of a general or permanent nature, and so required more than one reading. On this subject I will read what the court say on page 469:

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"Whether these ordinances were of a general nature, we deem it unnecessary to determine in the decision of the present case; but, in our judgment, the ordinances were of a permanent nature as distinguished from such as are of a temporary character. The subject matter of the ordinances was of a permanent nature—the same test we would apply in making the character of a law as general or local, to depend on the character of its subject matter. Property was to be condemned for the purpose of extending a street."

On page 470: "A distinction is sometimes drawn between an ordinance and a resolution, by which, the one prescribes a permanent rule of conduct or government, while the other is of a temporary character, and prescribes no permanent rule of government. The statute, however, refers both to 'resolutions and ordinances of a general or permanent nature.' But in *Upington v. Oviatt*, 24 Ohio St., 232 in which the preliminary resolution declaring the necessity of the proposed improvements * * * was not read on three different days, nor such reading dispensed with by a vote of three-fourths of the members elected, the court say: 'It was not a resolution of a permanent nature. It made no provision for the future, but simply declared an existing fact.' With such criteria of a temporary resolution, in the given instance, we would readily distinguish the ordinances under consideration as having a continuous effect, and permanent nature, within the statutory meaning."

On page 473: "It is contended, however, that the provisions of sec. 1694 are to be treated as directory only; but, notwithstanding a conflict of authorities, we are not disposed to depart from the principles announced in *Bloom v. Xenia*, and, in accordance with the decision of that case, we think, the provisions of the section should be held to be imperative or mandatory. Whether a provision of the constitution as to the passage of laws is mandatory or directory to the legislature will not furnish unerring guidance in municipal legislation. The whole legislative power of the state is vested by the constitution in the general assembly, subject to the special limitations contained in that instrument upon the exercise of that power; and if there is an apparent failure to comply with the constitutional directions, the judicial department of the government will not forget that every reasonable intendment is to be made in favor of the proceedings of the legislature. 'It is not to be presumed that the assembly, or either house of it, has violated the constitution.'"

"But municipal corporations act not by an inherent right of legislation, like the legislature of the state. They are governments of enumerated powers acting by a delegated authority. They are creatures of the statute, invested with such power and capacity only as is conferred by the statute, or passes by necessary implication from the statutory grant, and their powers must be strictly observed. * * * Such statutory powers constitute conditions precedent; and unless the ordi-

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nance is adopted in compliance with the conditions and directions thus prescribed, it will have no force.

"In *Clark v. Crane*, 5 Mich., 151, the Supreme Court laid down the rule that 'what the law requires to be done for the protection of the taxpayer is mandatory; and cannot be regarded as directory merely. The requirement that ordinances of a general or permanent nature, shall be fully and distinctly read upon three different days, being designed as a safeguard against rash and inconsiderate legislation, and being in a degree essential to the protection of the rights of property, it should likewise be deemed a mandatory measure intended as a security for the citizen.'

In *Elyria Gas and Water Company v. Elyria*, 57 Ohio St., 874, an action was brought by the Elyria Gas and Water Company, a taxpayer, under sec. 1778, Rev. Stat., after the city solicitor had refused, on request, to bring the action. The action was brought to enjoin the city and its mayor and clerk from issuing and selling bonds of the city for the purpose of raising funds with which to build waterworks. The case is practically stated in the syllabus:

1. "The proceedings of the council of a municipal corporation must in order to be valid, be within the powers conferred on it, and in substantial conformity with the statutes regulating them.

2. "The proper adoption, by the council, of the resolution declaring it to be necessary to issue and sell the bonds of the corporation for a specified purpose authorized by sec. 2835 of the Rev. Stat., and providing therein for the submission of the question of their issue to the electors at an election to be held for that purpose, is essential to the validity of all subsequent proceedings, and without which there can be no lawful issue or sale of the bonds.

3. "Such a resolution is of a general and permanent nature within the meaning of sec. 1694 of the Rev. Stat., and must, before it can be legally adopted by the council, be read on three different days, or the rule requiring such reading be dispensed with by three-fourths of the members elected to the council."

The last clause of paragraph 6 of the syllabus is pertinent to a question that was discussed upon the argument:

"The abuse of corporate powers, within the purview of sec. 1777, includes the unlawful exercise of powers possessed by the corporation, as well as the assumption of power not conferred."

I will not take time to read from the opinion in that case, although there is a pretty full discussion. There are other decisions, earlier decisions of the Supreme Court, and also reported decisions of the lower courts, quite a number of them, which have passed upon particular resolutions. Some are held to be of a general or permanent nature, and others of a special or temporary nature. I have examined all of them, but feel that this case is controlled by the two Supreme Court

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decisions which I have cited. The subject matter of the resolution in this case was the sale by the city of its entire gas plant, including the right of the purchaser of a part of it at least to perpetually maintain and operate it for the purpose of furnishing gas to the people of the city. It was not a private matter. It was not a matter in which the parties to the transaction were alone interested. All the consumers of gas within the city, present and prospective, and all the taxpayers of the city, were interested. The fact that the resolution may not amount to anything; that no bids may be filed, or that all bids may be rejected, or that the council may decide not to sell the property, does not change the nature of the resolution. It sets on foot proceedings, the object of which is to permanently dispose of the gas plant and permanently bestow its maintenance and operation upon private individuals. In the Elyria case the bonds of the city could not be issued until the electors of the city had voted in favor of it. The resolution simply declared the necessity of issuing the bonds, and directing that the question of issuing the bonds be submitted to the electors of the city at a general election to be held on a certain day. If two-thirds of the electors did not vote in favor of issuing bonds, the bonds would not be issued, and the council could proceed no further, and nothing would result from the resolution. Notwithstanding that, the resolution was held to be one of both a general and permanent nature. And further in that case, the bonds could not be issued or sold until an ordinance was passed directing them to be issued. I am of the opinion that the resolution directing the clerk to advertise for bids was not legally adopted, and that the subsequent proceedings of the council as to the sale of both parts of the plant were, for that reason, in contravention of law.

But it is said that so far as the sale of the outside part of the plant is concerned, the city has ratified the transaction by receiving and retaining the purchase price, and by acknowledging through the council that the company is the owner of the property, and by directing the gas trustees to turn the property over to the company. And it is said that by reason of these facts the city is now estopped from setting up defects and irregularities in the proceedings. It is claimed that the rules apply which would govern a transaction between individuals under like circumstances. In support of these propositions Cincinnati v. Cameron, 33 Ohio St., 336, is relied upon, and other cases of a similar nature are cited. In the Cameron case the plaintiff entered into a contract with the city of Cincinnati for the construction of a hospital building, and sued the city to recover the amount due for the construction. The statute under which the hospital was constructed provided that "it should be stipulated in the contract that the contractors will not execute any extra work unless ordered in writing by the board of hospital commissioners, and that they will not claim or such extra work unless such written order was given." The con-

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tract contained that stipulation. Extra work was ordered by the board, but no written order was given, the board informing the contractor that written orders were not necessary. The work was satisfactory, and the city received and enjoyed the benefit. It was held that the action of the board amounted to a waiver of written orders, and that the fact that they were not given, under all the circumstances of the case, is not sufficient ground of defense against the contractor's claim of payment for work done. In discussing that branch of the case the court announces the rule which is found in paragraph 5 of the syllabus :

"There is a distinction between those powers of a municipal corporation which are governmental or political in their nature and those which are to be exercised for the management and improvement of property. As to the first, the municipality represents the state, and its responsibility is governed by the same rules which apply to like delegation of power. As to the second, the municipality represents the pecuniary and proprietary interests of individuals, and within the limits of corporate powers, the rules which govern the responsibility of individuals are properly applicable."

I will read what the court say in this case in closing the opinion—page 374:

"We desire further to say that the remarks heretofore made upon the heads 'limits of expenditures,' and 'written orders,' are to be regarded as applying strictly to the case in hand. The authorities on the subject of municipal liability, when and how the body may be bound, what its extent of authority is, under what circumstances it may deny, are not at all uniform. A remark as apposite as any we have happened to meet, is that of Field, C. J., in *Argenti v. San Francisco*, 16 Cal., 283 : 'Upon the general subject of the extent of the liability of a municipal corporation, the authorities are a tangled web of contradictions, and it is difficult to assert any proposition with respect to the same, for which adjudications on both sides may not be cited.'

"Therefore it is that words should be retained unto the 'fitness of the matter.'"

These closing remarks warrant me in referring to some subsequent decisions of the Supreme Court where the questions arose under similar circumstances—that is, in suits by contractors against the city to recover for work done when the work was satisfactory and accepted and used and enjoyed by the city, and in which case the court declined to hold that the city was estopped from setting up as a defense defects and irregularities in the proceedings.

In *McCloud v. Columbus*, 54 Ohio St., 439, the plaintiff sought to recover of the city on a contract for grading and paving a street. It was held that the contract was not valid, because bids were not advertised for in the manner prescribed by law, and the city was not liable.

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In Lancaster v. Miller, 58 Ohio St., 558, the plaintiff sued the city to recover a balance for the construction of a sewer. It was held that the contract was invalid because bids were not advertised for according to law, and that the city is not estopped to set up such omission as a defense. It is not necessary for me to distinguish these cases (and no doubt they may be distinguished). Nor is it necessary to review the other decisions of a like nature that were cited, because the principles upon which these decisions are based do not, I think, have any application to this case. There is no issue here between the city of Toledo and the Kerlin Brothers Company as to this sale. The city is not defending against the claim of the company to the property. The council desire that the company shall have the property—I mean the outside part of the plant—and that is the matter that is under discussion now—and the council have done everything in their power to put the title to the outside part, and the possession in the company; but the proceeding here is by taxpayers or in behalf of taxpayers to prevent the performance of a contract on the ground that it is illegal. By sec. 1777, Rev. Stat., the city solicitor is authorized, not only that, he is required, to bring an action in the name of the corporation, whenever the circumstances demand it, to enjoin the misapplication of funds of the corporation, or the abuse of its corporate powers, or the execution or performance of any contract made in behalf of the corporation in contravention of law; and by sec. 1778 any taxpayer of the corporation may, in his own name or behalf of the corporation, bring such an action, if the solicitor, after written request, refuse to bring it. The Supreme Court say in Cin. St. R. R. Co. v. Smith, 29 Ohio St., 291, that taking these two sections together, namely, secs. 1777 and 1778, it is manifest that the particular object the legislature had in view was to provide convenient remedies for the protection of the taxpayer against the violation of sec. 1777. The action is prosecuted for the benefit of taxpayers, if not in their name, and proceeds upon the theory that the city is abusing its corporate powers, or about to execute or perform a contract which is in violation of law. The city is still in possession of the property, and until it is delivered to the company, the transaction is not completed; and the object sought in the city solicitor's action, and in his cross-petition filed by him in the replevin suit, is to prevent the delivery of the property and the complete performance of the contracts, and if the contracts are illegal no question of estoppel or ratification can arise.

In the action brought by the city solicitor he asks for an injunction against the sale of only the inside portion of the plant and the real estate connected with the outside portion. In my judgment it would have been entirely proper to include in this action the whole plant, and to ask for an injunction against the prosecution of the replevin suit until the validity of the sale should be determined in the application made by him. But in his cross-petition filed in the replevin case he asks for

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similar relief as to the remainder of the property, being the property described in the replevin petition. I know of no reason why this can not be done, and in so doing he is acting in the performance of his duty prescribed by sec. 1777. In view of the action of the council in acknowledging that the company is the owner of the outside part of the plant, and in directing that it be delivered to the company, the solicitor could rightfully draw and file the cross-petition in the replevin case only as an application for an injunction under and by virtue of sec. 1777. The cross-petition has all the features of an application to the court under that section. It is filed in the name of the corporation, as required by that section. And after setting out all the proceedings of the council, he alleges in the language of the section that the attempted sale of the property described in the petition and of the remaining property constituting the natural gas plant of the city, is an abuse of the corporate powers of the city, and in contravention of the laws governing the same; and he asks for an injunction restraining the Kerlin Brothers Company from in any manner taking possession of the property described in the petition, and that the pretended sale of said property be declared null and void.

Another question was raised which it is necessary to consider, and that is, whether the plaintiffs in what is known as the "gas trustees' suit" have the right to maintain the suit. It is conceded that the mayor is not a necessary or a proper party; and no reason has been given why the city of Toledo is a proper party. It is sufficient to say that the action was not brought by the solicitor in the name of the city under sec. 1777, Rev. Stat., and it is not claimed that the city authorized the bringing of the suit, either expressly or impliedly. As to the rights of the gas trustees to bring the suit very little need be said. The rule is, and I do not find that it is denied or doubted anywhere, that public officers as such have no right to bring suits in their own names, unless authorized to do so by statute. Dillon on Municipal Corporations, sec. 287 and note; Putnam v. Valentine, 5 Ohio, 187; Hunter v. Field, 20 Ohio, 340; Hunters v. Commissioners, 10 Ohio St., 515. The statute nowhere gives to the gas trustees authority to bring suits.

Counsel for the trustees contend that the suit is authorized by sec. 4995, Rev. Stat., which provides that a trustee of an express trust may bring an action without joining with him the person for whose benefit it is prosecuted.

Section 4993 is as follows: "An action must be prosecuted in the name of the real party in interest, except as provided in secs. 4994 and 4995.

"Section 4995. An executor, administrator or guardian, a trustee of an express trust, a person with whom, or in whose name a contract is made for the benefit of another, or a person expressly authorized by statute, may bring an action without joining with him the person for

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whose benefit it is prosecuted; and officers may sue and be sued in such name as is authorized by law."

The words "trustee of an express trust" have in law a well understood meaning, and of course it is with such meaning that they are used in sec. 4995. A trust, as defined by Justice Story, is an equitable right, title or interest in property, real or personal, distinct from the legal ownership thereof. An express trust is one that is created by the owner of property deliberately or intentionally, either in writing or by parol, in which the terms employed expressly designate the person, the property, and the object of the trust; and the trustee of an express trust is the person in whom the trust estate is vested. While public officers may be designated as trustees, or directors, or agents, they are not in any legal sense trustees of an express trust. I have examined all the authorities cited by counsel for the trustees, and am not persuaded that they sustain his position. My conclusion is that the plaintiffs in the gas trustees' suit have no right or authority to maintain the suit.

There was considerable discussion as to the right to an injunction against the prosecution of the replevin action, and many authorities were cited. I take it that this discussion had reference mainly to the gas trustees' suit, as an injunction against the prosecution of the replevin action was a part of the relief asked for in that suit. It is evident that the relief asked for by the solicitor, both in his petition and his cross-petition, cannot be obtained on the presentation and trial of the legal issues in the replevin case. His remedy is solely in equity under the statute. If the replevin case is allowed to proceed, the plaintiff will obtain possession of the property in due course of the proceedings in that case, which the solicitor wants to prevent. That can only be done by injunction. In the ordinary action of replevin, where the property is confessedly personal, and is susceptible of delivery by the officer to the plaintiff on the giving of a bond, or by the officer to the defendant on the giving of a counter bond, and where all the grounds for equitable relief which the defendant has he may set up as a defense in the replevin suit, then he has an adequate remedy at law, and the rule is unquestioned that injunction will not lie. But the situation here is peculiar and unusual, and I may safely say without precedent. Whether the property is real or personal is in dispute. It ought not to be treated as personal and detached by the officer holding the writ of replevin until that question is settled. Again, to appraise the property as required, it must be examined, and as it consists largely of pipes buried in the ground, it cannot be examined and delivered in all reasonable probability without severing the plant and cutting off the supply of gas from the city's consumers. While I think that the injunction prayed-for in the cross-petition, restraining the plaintiff from taking possession of the property, in effect includes a suspension of the replevin proceeds

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ings which will result in a delivery of the property to the plaintiff; yet, under the prayer for general relief, the injunction should be made broad enough to include a stay of all proceedings in the replevin action.

Final decrees will be entered in these actions as follows: In the replevin case, final decree in favor of the defendant for injunction as prayed for, including a stay of the replevin proceedings; in the city solicitor's action, a final decree of injunction will be entered in favor of the plaintiff as prayed for; in the gas trustees' suit, the motion for an injunction will be overruled and the petition dismissed, and judgment rendered for the defendants.

Hamilton & Kirby and *E. W. Tolerton*, for Kerlin Brothers Co.

M. R. Brailey City Solicitor, *C. S. Northup* and *Hurd, Brumback & Thatcher*, for the other parties.

PLEADING.

[Superior Court of Cincinnati, Special Term, September, 1900.]

* DAVID G. EDWARDS, ADMR., v. JOHN C. DALLER.

INCONSISTENT AVERMENTS—REFORMATION REQUIRED.

Where a pleading contains inconsistent averments, as where a petition contained such averments as to interest due, which, when taken in connection with the recital in general terms of a subsequent agreement, made it uncertain whether plaintiff counted on the agreement or a note, the pleader should be required to reform such pleading.

Heard on motion to separately state and number.

DEMPSEY, J.

There are two inconsistent averments in the petition as to the amount of interest due at the filing thereof, which, when taken in connection with the recital in general terms of the subsequent agreement between Mrs. Oskamp, Albert Oskamp and Daller, makes it uncertain whether plaintiff count on that agreement or on the original note signed by Albert Oskamp and Daller. Defendant is entitled to know what he is to respond to, and I think the petition ought to be reformed so that plaintiff may show to the court and the defendant whether he is suing on the note or on the agreement, or, what seems to me the preferable way, plaintiff ought to state all the facts connected with the note and agreement, and then let the court deduce the legal conclusions apparent therefrom.

The first two grounds of defendant's motion will therefore be granted.

Harlan Cleveland, for motion.

C. W. Baker, contra

* For another decision in this case, see *ante*.

Superior Court of Cincinnati.

ATTACHMENT.

[Superior Court of Cincinnati, Special Term, September, 1900.]

* HICKS, TRUSTEE, v. JOHN H. GRUSSEL ET AL.

1. POSSESSION BY SHERIFF'S KEEPER:

Possession by a sheriff's keeper constitutes possession by the sheriff.

2. ARRANGEMENT BETWEEN SHERIFF AND PARTIES.

Arrangement between the sheriff and parties to the suit as to sale of property levied upon, is not invalid where no bad faith is shown.

An action to determine the rights of John H. Grussel and W. At Hicks, trustee, to a fund now in the hands of the sheriff by virtue of an attachment, issued and levied and a sale made thereunder at the instance of Grussel.

DEMPSEY, J. (mem. of opinion)

"1. That the property was in the possession of the sheriff there can be no doubt, since it was in the possession of his keeper, and was ever under the control of the defendant, Poll. A keeper's possession is sufficient under the first head-note to Root v. Railroad Co., 45 Ohio St., 222.

"2. The evidence does not show the least bad faith on the part of the sheriff or parties to the attachment. In fact, the arrangement as at first entered into was, as said in Baldwin v. Jackson, 12 Mass., 132, an innocent and laudable one, and there is not a particle of evidence in the case to show that the plaintiff was misled or deceived thereby or hindered from prosecuting or securing his claim; and there is a modicum of evidence which shows that plaintiff, through an agent of his at least, was cognizant of the arrangement and did not seriously object to it. I think the equities of the case on the evidence are with the defendants, and judgment will be decreed accordingly."

W. A. Hicks and A. J. Cunningham, for the plaintiff.

F. E. Niederhelman, contra.

* For a previous decision in this case, see 9 Dec., 542.

Burdick v. Shaw.

DESCENT AND DISTRIBUTION.

[Lucas Common Pleas, March 20, 1899.]

ALEXIS C. BURDICK V. ISAAC N. SHAW ET AL.

DESCENT AND DISTRIBUTION—INTESTATE—ANCESTRAL PROPERTY.

The real estate, acquired by descent from a paternal ancestor, of one who dies intestate leaving neither widow, children, brothers, sisters nor parents, passes, under sec. 4158, Rev. Stat., to the brothers and sisters of the father, or their legal representatives, whether such brothers and sisters are of the whole or half-blood of the father.

PUGSLEY, J.

This is an action of partition, and is before the court on a demurrer to the answer and cross-petition of the defendants, Irving Coon and others. The parties to the suit claim to be the heirs at law of one Rufus C. Baker, who died intestate on February 3, 1898, and was at the time of his death the owner of the real estate described in the petition. This real estate came to said Rufus C. Baker by descent from his father Wm. Baker. The said Rufus C. Baker left surviving him neither widow nor children nor brothers nor sisters nor parents. The plaintiff is a son of a deceased sister of the said Wm. Baker of the whole blood. The cross-petitioners are children of a deceased sister of the said Wm. Baker of the half-blood.

The question presented by the demurrer is whether the children of the deceased sister of the half-blood of said Wm. Baker have inherited any interest in said real estate. The answer to this question depends upon the proper construction of sec. 4158, Rev. Stat., which section regulates the descent of real property which has come to the intestate by descent, devise or deed or gift from an ancestor. In this case, under sub. 5 of said section, the real estate of Rufus C. Baker upon his death passed to and vested in the children of the brothers and sisters of Wm. Baker, the ancestor.

The language of said subdivision is as follows: "The estate shall pass to and vest in the brothers and sisters of such ancestor, or their legal representatives, and for want of such brothers and sisters or their legal representatives, to the brothers and sisters of the half-blood of the intestate or their legal representatives, though such brothers and sisters are not of the blood of the ancestor from whom the estate came."

Under this statute the half-brothers and sisters of the ancestor cannot inherit at all unless they are included in the words "brothers and sisters of the ancestor," because it is expressly provided that for want of such brothers and sisters of the ancestor or their legal representatives the estate shall pass not to the half-brothers and sisters of the ancestor, but to the half-brothers and sisters of the intestate.

In this respect, as well as in other respects, sec. 4158, Rev. Stat., differs from sec. 4162, Rev. Stat., which was construed by the Supreme

Court in Stembel v. Martin, 50 Ohio St., 495, and upon which decision counsel for plaintiff rely.

The question then is, whether, under sub. 5, of sec. 4158, Rev. Stat., the half-brothers and sisters of the ancestor are included in the words, "brothers and sisters of the ancestor," and so inherit equally with the brothers and sisters of the ancestor of the whole blood.

It seems to me that this question was decided in Cliver v. Sanders, 8 Ohio St., 502. The syllabus is as follows:

"Under the fourth subdivision of the first section of the statute of descents of 1835, the half-brothers and sisters * * * are included in the words 'brothers and sisters of such ancestor,' and are preferred to the brothers and sisters of the intestate, of the half-blood, who are not of the blood of the ancestor from whom the estate came." The intestate in this case was James S. Cliver. The property in question came to him by descent from his mother, Keziah Cliver. One David Shumard was the half-brother of the mother, and he claimed the property. The other claimants were the half-brothers and sisters of the intestate, who were not of the blood of his mother.

After quoting the statute of 1835, which so far as any question here is concerned, is precisely the same as sec. 4158, Rev. Stat., and after referring to numerous decisions, Judge Swan, delivering the opinion of the court, says, page 507: "Under the decisions above referred to, half-brothers of an ancestor are included in and designated by 'brothers,' wherever that term is used without limitation. We do not perceive anything in the terms or context of the statute under consideration to control or limit this general meaning. * * * To limit the words of the fourth subdivision to brothers and sisters of the ancestor of the whole blood would not be in accordance with the presumptive intention of the legislature." There is a full discussion of the subject in the opinion, but I will not take the time to read further.

Under this decision a decree was entered in favor of David Shumard, the half-brother of the mother. The only reason which is urged against this case as an authority, is the fact that there was no brother or sister of the ancestor of the whole blood, or a legal representative of such brother or sister, as there is here. But the ground upon which the half-brother inherited was that he was included in the words "brothers and sisters of the ancestor." If he was not so included, there being no brothers and sisters of the whole blood, then the estate under the statute would go to the half-brothers and sisters of the intestate. The half-brother of the ancestor being a brother of the ancestor within the meaning of said sub. 5, it necessarily follows that all brothers and sisters inherit equally whether of the whole blood or the half-blood, and not one to the exclusion of the other, nor one in preference to the other. This decision was followed in White v. White, 19 Ohio St., 531.

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A reference to these decisions seems to be all that is necessary. But counsel for plaintiff rely upon *Stembel v. Martin*, 50 Ohio St., 495. This case involved the construction of the supplementary act of April 11, 1877, which is now embraced in sec. 4162, Rev. Stat., and which reads as follows: "When any person, the relict of any deceased husband or wife, shall die intestate and without issue, possessed of any real estate or personal property which came to such intestate from any former deceased husband or wife under the provisions of the second section of the act, to which this act is supplementary, then such estate, real and personal, shall pass and descend, one-half to the brothers and sisters of such intestate or their legal representatives, and one-half to the brothers and sisters of such deceased husband or wife from whom such personal or real estate came or their personal representatives."

It was held by a majority of the court (two judges dissenting) that "upon the death of the relict without issue and intestate, seized of the property, it descends under sec. 4162, Rev. Stat., one-half to the brothers and sisters of the whole blood of the former deceased husband or wife or their representatives, if there be such, and if not, then to those of the half-blood and their representatives, and the other half to the brothers and sisters of the deceased relict and their representatives, in the like order, and that such property has descended in the same way since the passage of the supplemental act of April 11, 1877."

It was the opinion of a majority of the court that property which has come to the relict of a deceased husband or wife under sec. 2 of the act of April 17, 1857 (now sec. 4159, Rev. Stat.), is non-ancestral in its character, and that the one-half which by the supplementary act of 1877 goes to the brothers and sisters of the deceased husband or wife, passes according to the rules of descent governing non-ancestral property, first to the brothers and sisters of the whole blood, and if there are none, then to the brothers and sisters of the half-blood, especially as the supplementary act does not in itself provide a complete scheme of descent.

But it was assumed by all the judges, both the majority and minority, that in sec. 4158, Rev. Stat., which regulates the descent of ancestral property, the words "brothers and sisters" wherever used, include both those of the half-blood and those of the whole blood.

This decision does not in any way qualify *Cliver v. Sanders*, nor change the well settled construction of sec. 4158, Rev. Stat., as to the descent of ancestral property.

The demurrer is therefore overruled.

Waite & Snider, for plaintiff.

Musser & Kohler, for defendants.

CORPORATIONS—STOCKHOLDER'S LIABILITY.

[Superior Court of Cincinnati, Special Term, 1900.]

HENRY HAUENSCHILD V. STANDARD COFFIN CO. ET AL.

1. RENEWALS OF NOTES DO NOT CREATE NEW DEBT.

Renewals of notes, or changes in the form of the evidence of a precedent debt, do not create a new debt or operate as a discharge or satisfaction of the old debt, unless it is so expressly agreed between the parties.

2. RENEWAL OF NOTES DO NOT RELEASE STOCKHOLDER.

The renewal of notes by a corporation after the sale or transfer of stock by a stockholder do not release the stockholder from liability thereon, although the renewals were made without his knowledge or consent.

Kramer & Kramer and *J. B. Frenkel*, for creditors.

S. G. Stricker, for *J. L. Goldman*.

EXCEPTIONS to finding and report of referee.

DEMPSEY, J.

This action is one to assess the individual liability of the stockholders of the defendant corporation. The cause was referred to S. M. Johnson, Esq., for findings and report.

From the evidence reported it appears that one Louis J. Goldman was one of the original stockholders of said corporation; that during the time he continued as a stockholder said corporation became indebted, for moneys advanced, to the firms of P. J. Goodhart & Co. and Freiburg & Workum, and that said indebtedness was evidenced by promissory notes given to said firms; that before the maturity of this indebtedness originally the said Goldman sold and transferred his stock in said company and ceased to be a stockholder; that when said indebtedness did mature the same was not paid, but the time of payment was extended and new notes given in renewal of the old ones, and that such extension and renewals were made several times.

Goldman now claims that he is not liable, as a stockholder, for this indebtedness—first, because the extension and renewals, by giving and taking new notes, operated as payment of the original indebtedness, and, secondly, because the statutory liability of stockholders, being a collateral liability in the nature of a suretyship, the renewals operated in law to extinguish his liability. The referee found against Mr. Goldman on both contentions.

As to the proposition that renewals of notes, or changes in the form of the evidence of a precedent debt, do not create a new debt or operate as a discharge or satisfaction of the old debt, unless it is so expressly agreed between the parties, the law is well settled in Ohio; and it is further settled that the evidence must affirmatively and clearly show such to have been the agreement of the parties. See *Merrick v. Boury*, 4 Ohio St., 60; *Leach v. Church*, 15 Ohio St., 169; *Wise v. Miller*, 45

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Ohio St., at 388-398. The referee on this question of fact found against Mr. Goldman, and this court sees no reason to alter that finding.

As to the second proposition contended for by Goldman, the ruling of our Supreme Court is to the contrary. In Boice v. Hodge, 51 Ohio St., 236, which was a case of renewals of notes, after the sale and transfer of the stock by the stockholder, and which renewals were made without the knowledge or consent of said former stockholder, the court held that such stockholder was nevertheless liable. This court, of course, is concluded by that decision. As a consequence, the exceptions taken will be overruled and the report of said referee confirmed.

COUNTY OFFICERS—COMPENSATION.

[Hamilton Common Pleas, 1900.]

STATE EX REL. HARRISON V. EUGENE L. LEWIS, AUDITOR.

1. RULE AS TO CONSTRUCTION OF STATUTES.

In so far as acts of the legislature are irreconcilable, the one signed last must prevail; but to those parts which do not antagonize each other, and are merely supplemental, effect must be given to the will of the legislature. *State ex rel. v. Halliday*, 63 Ohio St., 165, followed.

2. SECTION 20, ART. 2, CONST.—COUNTY OFFICERS.

The provisions of sec. 20, art. 2, of the constitution, that the salary of a county official cannot be increased during his term of office, apply only to compensation for duties germane to his office or incidental or collateral thereto, and do not apply to services rendered in an independent employment to which he is appointed by an act of the state legislature.

3. 94 O. L., 396, NOT APPLICABLE TO INDEPENDENT EMPLOYMENT.

The act of 94 O. L., 396, providing, "that no act heretofore passed at this session of the general assembly regulating the salaries and compensation of county officers in any county of the state, shall be construed to affect or change in any manner the salary or compensation of any county officer elected prior to the passage of such act" applies only to the elective county officers in their respective offices, and does not apply to additional, independent offices imposed upon them by the legislature.

4. SURVEYOR ENTITLED TO PAY AS MEMBER OF BOARD OF EQUALIZATION.

Under the foregoing rules, a county surveyor who is required by law to perform the duties of a member of the county board of equalization, is entitled to compensation therefor, independent of and without regard to the compensation which he may receive as county surveyor.

Frank F. Dinsmore, for the relator.

Wilson, Cosgrave & Jones, contra.

SPIEGEL, J.

The relator in this case says that he is the surveyor of Hamilton county; that under the law he was a member of the county board of equalization of the real property within the county of Hamilton for the year 1900; that he was employed in said work sixty-seven days, and that therefore he was entitled to payment in the sum of \$335, which sum was allowed to him by the said county board of equalization, and said act certified to the county auditor; that the said auditor, although a

sufficient amount of money has been appropriated and set apart by the county commissioners and board of control by proper semi-annual resolution for the payment of the salaries of the members of the county board of equalization, and said amount is now in the county treasury, refused and still refuses to pay the relator's salary, wherefore this suit in mandamus is brought, to which a demurrer has been filed by the county solicitor.

Section 2813, Rev. Stat., as amended by the Royer Law, 94 O. L., 336, provides that the auditor, surveyor and commissioners of the county shall compose the decennial county board of equalization of the real property of the county, but makes no provision for a salary. This act was passed on April 16, 1900. On the same day was passed the Hendley Law, 94 O. L., 246, not changing the personnel of the board of equalization, but providing a compensation for each member of \$5.00 per day for each day so necessarily employed. This latter law was signed and enrolled after the first bill.

In *State ex rel. Guilbert, Auditor, v. Halliday, Auditor*, 63 Ohio St., 165, our Supreme Court, in construing these two statutes, holds that "in so far as these two enactments are irreconcilable, effect must be given to the one which is the later law." This gives expression to the well-known rule of law that repeals by implication are not favored, and that an implied repeal results only from a later enactment when its terms and necessary operation can not be harmonized with the terms and necessary effect of the earlier law. That this is not the case in the present instance is apparent at first blush. The later law amends the original, providing for the appointment of officers, which was passed the same day, by adding a supplemental section thereto, fixing, among other things, the compensation of such officers.

Now, in the language of the Supreme Court, in so far as these acts are irreconcilable, the one signed last must prevail; but to those parts which do not antagonize each other, but are merely supplemental, effect must be given to the will of the legislature, which gives these officers a compensation for their services. It is contended, however, by counsel for the auditor, that—

First. The surveyor is a county official, and therefore in accordance with sec. 20, art. 2 of the constitution of the state, his salary can not be increased during his term of office; and

Second. That should this constitutional provision not apply, a law passed by the late general assembly, 94 O. L., 396, providing "that no act heretofore passed at this session of the general assembly, regulating the salaries and compensation of county officers, in any county of the state, shall be construed to affect or change in any manner the salary or compensation of any county officer elected prior to the passage of such act or acts," invalidates the only salary clause of the Hendley law.

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The county surveyor is elected in accordance with secs. 1668-1201 of Rev. Stat., and no fixed salary is attached to his office, but his compensation is by fees, paid by parties seeking his services; nor is he subject to the provisions of the Hamilton county fee law, but retains all fees paid him for services rendered. It is contended that the constitutional provision quoted above, which allows no change during his term of office in the salary of any officer does not apply to the relator, in accordance with the decision of our Supreme Court in Gobrecht v. Cincinnati, 51 Ohio St., 68, which holds that a *per diem* compensation of a councilman is not salary, and may be increased during the latter's official term; that therefore fees paid for each service rendered could not be salary, and hence the constitutional inhibition would not apply to the relator. But this is begging the question. It must be apparent that the fees of the county surveyor for services rendered as such surveyor have neither been increased nor decreased. A compensation has been fixed by law for his services as a member of the county board of equalization. There is no doubt that an officer who receives a stated salary can not recover further compensation for extra duties imposed upon him by the legislature germane to his office, or even for incidental or collateral services which properly belong to or form a part of his main office. But this rule has its limit. As Judge Potts (24 N. J. L. R., 768) says:

"It does not follow from the principles laid down that a public officer is bound to perform all manner of public service without compensation, because his office has a salary annexed to it, nor is he, in consequence of holding an office, rendered legally incompetent to the discharge of duties which are clearly extra-official, outside the scope of his official duty."

And this is further exemplified by the opinion of Mr. Justice Miller, delivered in United States v. Saunders, 120 U. S., 127, wherein he holds that a clerk in the office of the president of the United States, who is also appointed to be the clerk of a committee of congress, and who performs the duties of both positions, is entitled to receive the compensation appropriated and allowed by law for each, notwithstanding secs. 1763, 1764 and 1765, U. S. Rev. Stat., providing that no person who holds an office, the salary or annual compensation attached to which amounts to the sum of \$2,500, shall receive compensation for discharging the duties of any other office, unless expressly authorized by law; nor shall any allowance or compensation be made to any officer or clerk by reason of the discharge of duties which belong to any other officer or clerk, in the same or any other department. Justice Miller says:

"We are of opinion that taking these sections altogether the purpose of this legislation was to prevent a person holding an office or appointment, for which the law provides a definite compensation, by

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way of salary or otherwise, which is intended to cover all the services, which, as such officer, he may be called upon to render from receiving extra compensation, additional allowances, or pay for other services, which may be required of him, either by act of congress, or by order of the head of his department, or in any other mode, added to or connected with the regular duties of the place which he holds; but that they have no application to the case of two distinct offices, places or employments, each of which has its own duties and its own compensation, which offices may both be held by one person at the same time. In the latter case he is, in the eye of the law, two officers, or holds two places or appointments, the functions of which are separate and distinct, and, according to all the decisions, he is in such case entitled to recover the two compensations. In the former case he performs the added duties under his appointment to a single place; and the statute has provided that he shall receive no additional compensation for that class of duties unless it is so provided by special legislation."

The rule, therefore, may be stated as follows: "When a public officer is employed to render services in an independent employment not germane or incidental to his official duties, to which the law has annexed compensation, he may receive for such services additional compensation."

I come now to the last question raised by the county solicitors, in the event that my finding should be in favor of the relator upon the other issues raised, namely, that of the act passed by the last general assembly, providing that no act heretofore passed at this session of the general assembly, regulating the salaries and compensation of county officers in any county of the state, shall be construed to affect or change in any manner the salary or compensation of any county officer elected prior to the passage of such act or acts.

It must be plain from what I have said heretofore that a broad distinction prevails between the salary or compensation of a county officer in the discharge of the office for which he was elected, and in the salary or compensation of an independent office, to which he has thereafter been appointed by the general assembly, not germane to his elective office, but entirely independent therefrom. The last general assembly passed numerous laws changing the compensation of county officials in the following counties from fees to stated annual salaries, to-wit: Athens, Belmont, Clermont, Crawford, Fayette, Fulton, Highland, Lawrence, Marion, Meigs, Morrow, Muskingum, Ottawa and Putnam.

The act quoted above provides that no salary or compensation "of any county officer elected prior to the passage of acts regulating salaries or compensation of county officers in any county of the state, shall be affected thereby." The members of the county board of equalization are not elected, but by the act of the general assembly ever since 1880,

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and farther back, said board consisted of the auditor, surveyer and commissioners.

Construing all these statutes *in pari materia* the law cited can only apply to elective county officers named in the numerous acts, namely, probate judge, clerk of courts, auditor, treasurer, sheriff, recorder, prosecuting attorney and commissioners elected prior to the passage of the act, an act which abolished the fee system in said counties, and provided the application of the salary system to the successors of such officers now holding office in the counties named.

And when in addition to this we further see that the act does only refer to salaries or compensation of county officers in their respective county offices, and not to additional, independent offices imposed upon them by the legislature, we can come to but one conclusion, namely, that the act does not affect the relator in his demand for the salary earned as a member of the county board of equalization.

As the demurrer admits all these facts, the prayer of the relator that a peremptory writ of mandamus issue to the county auditor, commanding him to draw his warrant on the county treasurer for \$335, and deliver the same to him, must be granted.

JOINDER OF CAUSES.

[Hamilton Common Pleas, 1900.]

ANDREW MURPHY v. CINCINNATI.

LEGAL AND EQUITABLE CAUSES MAY BE UNITED.

It is proper to unite legal and equitable causes of action, or one sounding in tort and another in contract, if included in the same transaction, and connected with the same subject matter.

Corporation Counsel, for the demurrer.

Ed. H. Williams, contra.

SPIEGEL, J.

Defendant, the city of Cincinnati, demurs to the petition in this cause filed because several causes of action stated therein are improperly joined.

Plaintiff, in his first cause of action, alleges that the city wrongfully, without notice to him, appropriated a certain part of his real estate for street purposes, for which he asks damages in the sum of \$500. In his second cause of action plaintiff alleges that the city, after making said street, levied an assessment upon the abutting real property, wrongfully, as he claims, which he paid, in the sum of \$34.09, and for which sum he asks judgment. In his third cause of action plaintiff alleges the same state of facts as to a second assessment for \$71.83, for

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which he also asks judgment and a restraining order against all further assessments.

Old sec. 5019, now sec. 5022, Rev. Stat., provides that the plaintiff may unite several causes of action in the same petition, whether they are legal or equitable, when they are included in the same transaction or transactions connected with the same subject of action. Judge Swan, in *Sturges v. Burton*, 8 Ohio St., 215, 218, lays down the following rule, which has been followed in all code states:

"By the provisions of the code, the plaintiff may unite in one action all causes of action arising from 'the same transaction or transactions connected with the same subject of action'; and this includes causes of action legal and equitable, *ex contractu* and *ex delicto*. But if the causes of action do not arise from the same transaction or transactions connected with the same subject of action, then causes of action *ex contractu* can not, in general, be united with causes of action *ex delicto*."

The first question to be determined is, were these different causes of action included in the same transaction or transactions connected with the same subject of action?

Plaintiff claims that a part of his real property is illegally appropriated by the city for street purposes, and that thereafter the remainder of his real property is assessed for the making of this same street. There are clearly several causes of action included in transactions connected with the same subject of action. It is true that the first cause of action sounds in tort, but I doubt whether the assessments levied by the city upon plaintiff, which he complains are illegal, establish a contractual relation between him and the city. At the most plaintiff has united legal and equitable causes of action in his petition, which is clearly permissible under the statute, when they are included in the same transaction, connected with the same subject of action. But even were different causes of action, one sounding in tort and the other in contract, united, it included in the same transaction, as in this case this would be proper pleading.

Upon either proposition the demurrer must be overruled, and leave is granted defendant to plead further.

STATUTES—PROOF OF ENACTMENT.

[Superior Court of Cincinnati, Special Term, 1900.]

MICHAEL BURKE V. CINCINNATI ET AL.

I. LAW FAILS FOR LACK OF PROOF OF ENACTMENT.

Where a law passed by the general assembly does not appear in the secretary of state's office, nor on the journal of either house, it must fail as a law, not from any defect in its passage, but because there is no certainty as to what the law is or was.

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2. RULE APPLIED—98 O. L., 657, VOID.

The act 98 O. L., 657, to authorize cities of the first class to issue bonds to pay for property appropriated to open, extend, widen or straighten streets, which does not appear (as it appears in 98 O. L., 657, the words "or its successors" inserted by amendment, are omitted,) in the office of the secretary of state or on the journal of either house, is void under the rule stated.

H. D. Peck, for plaintiff.

E. G. Kinkead, corporation counsel, for the city.

DEMPSEY, J.

This case presents some curious features in regard to the enactment, authentication, and enrollment in the office of the secretary of state, of an act, on the proof of the existence of which the controversy herein hinges.

By reason of the rule of evidence which requires courts to take judicial notice of the doings of the legislative branches of the government, as evidenced by their journals, and by reason of the verity which such journals import, the petition ekes out by such journals, in effect states that on March 7, 1898, there was introduced into the house of representatives, a bill number H. B. No. 486, "To authorize cities of the first class to issue bonds to pay for property appropriated to open, extend, widen or straighten streets;" and the bill was read the first time. On March 8, the bill was read the second time, and referred to the committee on municipal affairs. On March 25, the bill was reported back, recommended for passage, and ordered to be engrossed. On April 7, the bill was read the third time and referred to a select committee of one, with instructions to amend by inserting in seven distinct and appropriate places, the words, "or its successors," which committee of one reported the bill amended as instructed, and thereupon the bill was duly passed. On April 11, the bill designated as H. B. No. 486, was reported to the senate as having passed the house, and concurrence requested. The bill was introduced and read the first time. On April 12, it was read the second time, and referred to the senate committee on Municipal Corporations No. 1. On April 19, this committee reported and recommended the bill for passage; and on April 22 it was read the third time and duly passed and the passage thereof reported to the house. The joint committee, from both houses, on enrollment, reported to the house on April 23, and to the senate on April 25, that it had examined the bill and found it correctly enrolled. On April 23, the speaker of the house, in the presence of the house, signed the bill. On April 25, this was reported to the senate, and, on the same day, the bill was signed by the president of the senate, in the presence of the senate.

No copy of the bill as originally presented in the house, or as amended and passed, appears on the journal of either house. In the printed volume of laws for the year 1898, duly certified to by the secretary of state, 98 Ohio Laws, at page 65, appears what purports to be

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said House Bill No. 486, but an inspection of the same shows the entire absence therefrom of the words "or its successors," in the various places wherein they were ordered to be inserted by the amendment authorized and passed in the house. It is very evident, then, that the act as contained in the printed volume of laws is not the act that was passed by both houses of the general assembly. It is also manifest that an act relating to the subject embraced in the title of the printed act was passed by both of said houses.

It has been held that where a bill appears as passed in the annual volume of laws, but does not so appear by the journals of the house and senate, it is not a law, for the journals are the highest evidence and must control. *State v. Price*, 4 Circ. Dec., 296. This ruling disposes of the bill, or act, that appears in the 1898 volume of laws.

But how about the bill that was passed; can it be set up as law, and in what manner may it be proved?

Section 128, Rev. Stat., provides that the secretary of state shall have charge of and safely keep all the laws that may be passed by the legislature. In other words, all laws, duly enacted, must be filed with him. If a law duly enacted is not filed with him, what will be the consequence?

The answer seems to be found in *State v. Kiesewetter*, 45 Ohio St., 254, where the whole subject of enacting and authenticating laws is fully considered. In this case the bill had duly passed both houses, but it had not been copied upon the journal of either house, nor signed by the presiding officer of either house, nor there enrolled as a law, nor filed in the regular course of procedure in the office of the secretary of state, nor was it published among the laws enacted by the particular general assembly, and it was held, among other things that parol evidence could not be received to prove its contents, even though such evidence consisted of a printed bill, bearing title and number identical with the one described in the journals, and deposited in the state library in accordance with sec. 59 of Rev. Stat. At page 261 the court say:

"And this is a practical question: Where a bill has received the sanction of a majority of each house of the general assembly, but has not been signed by the presiding officer of either house, or filed in the office of the secretary of state in the regular course of procedure, or enrolled there, or published among the authorized laws, can it be treated as law by the courts?"

And the court say that it can not. Now, while but one or two of the various delinquencies set forth in the extract above appear in the case at bar, yet they are of such character as will peculiarly appropriate to themselves as pertinent to the argument of the court in reaching the conclusion arrived at. For, continuing, the court say:

"The importance of furnishing to the people sources of information, certain in their character and convenient of access, as to what is and

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what is not law, is obvious. All are presumed to know the law, and it is of great interest to each citizen, as well as to the public officer, that there be some authentic record to which he may resort to ascertain certainty and definitely what laws are enacted by the legislature, what control him in the daily transaction of business, and of what, at his peril, he is bound to take notice. Whatever conduces to certainty in this regard, therefore, is of great moment to every person in the state, and no rule of construction would be wise which leaves so important a matter in doubt or confusion."

The law that was passed does not appear in the secretary of state's office; it does not appear on the journals of either house; we can not set it up by parol evidence. Therefore the law as passed must fail as a law, not from defect in its passage, but because we have no certainty as to what the law is or was. The answer of the defendants, outside of the admissions, being a mere denial, in reality denied only conclusions of law. The demurrer searching the record, therefore, tests the sufficiency of the petition, which under the views here enunciated, states a good cause of action, and the defense pleaded being insufficient in law the demurrer thereto must necessarily be sustained.

CONTRACTS—LIENS.

[Superior Court of Cincinnati, Special Term, 1900.]

* FRANKLIN BANK V. CINCINNATI ET AL.

1. MECHANICS' LIEN LAW INCLUDES ALL ASSIGNMENTS.

Section 16 of the Mechanic's Lien Law of 1877, 74 O. L., 668, now sec. 3203, Rev. Stat., providing that "any assignment or transfer by said head contractor of his contract with said owner shall save and be subject to the claims of every laborer, mechanic or sub-contractor or material man who has furnished any labor, material or machinery toward the construction, alteration, removal or repair of any property designated in this act," in the use of the word "any" or "an," as it now appears, is comprehensive enough to and does include all assignments of whatever character and whenever made.

2. STATUTE NOT RESTRICTED BY "WHO HAS FURNISHED."

The words "who has furnished," as used in said section, are not intended to designate or fix qualifications of time with reference to the assignments that are governed by the act, but are intended as *descriptio personarum*.

3. LIENS VALID AGAINST PRIOR ASSIGNMENT.

Under the foregoing rules the liens for material furnished contractors with a municipal corporation in the construction of a sewer are not defeated or postponed by an assignment by the contractors of their claims against the city to a bank, to secure advances to carry on the work, although such assignment was made prior to the time when the liens were acquired.

4. MATERIAL MAN—LIEN VALID THOUGH MATERIAL DIVERTED.

A party who, in good faith, furnished 1,849,000 brick under an estimate that 1,900,000 would be required for a certain sewer improvement, the brick being delivered on the cars and hauled by the contractor to where they were needed

* Affirmed by the general term, November 27, 1900, "on the reasoning of the opinion of the court below."

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for the work, is entitled to a lien for the full amount of his claim, although 55,000 of the brick, after they had passed out of his possession, were diverted and used in another improvement; and although, under the circumstances stated, he knew that the bricks were so used and made no objection.

5. DELIVERY, IN LEGAL SIGNIFICANCE.

Delivery, in its legal significance, comprehends two things: a tender of the goods on the part of the vendor and an acceptance on the part of the vendee. When these two acts concur, title is transferred.

6. DELIVERY CONTEMPLATED BY MECHANICS' LIEN LAW.

The delivery contemplated by the Mechanics' Lien Law, is a delivery which vests in the head contractor the title or ownership of the materials for which a lien or claim to priority is sought.

7. DELIVERY WITHOUT ACCEPTANCE—INCOMPLETE.

The delivery of brick along the line of a proposed improvement, where the time in which it was to be completed was uncertain and the quantity of brick to be used could not be determined in advance, and where the brick were received subject to approval by the city engineer, amounts to a simple tender of the material and the delivery, from which the statute will run against the lien of the material man, is not complete until the material is accepted by the city engineer.

8. RULE AS TO INVOKING INTERPLEADER.

The subject of an action is not necessarily the specific amount sought to be recovered by the plaintiff; it is the amount due on the contract itself. Therefore, where there are conflicting claims to the whole amount due, which render it unsafe for the party liable to determine whom to pay, he may avail himself of the statute of interpleader, even though plaintiff claims only a part of the amount due under the contract involved.

9. PETITION IN ACTION WHERE INTERPLEADER IS DEMANDED.

A petition in a suit by a bank as assignee of contractors to recover money due from a municipal corporation, in which the corporation has filed an affidavit for interpleader, is not subject to demurrer by one of the impleaded defendants, holder of a mechanic's lien, on the ground that such petition does not state a cause of action against him. Such suit, being originally a simple action at law, was, by the action of the city in demanding interpleader, converted into an equitable action wherein all parties are actors and all parties defendants, seeking rights in a common fund.

10. DEMURRER OVERRULED.

Where, in such a case, there is nothing in the petition which shows any claim against defendant to the fund in controversy, the court, on his demurrer, has nothing to pass upon, but must overrule the demurrer and leave the question to be settled upon future pleadings and the evidence.

11. PROPER METHOD OF PLEADING DISCLAIMER.

The proper way to set up the fact that the subject of plaintiff's action is not claimed by one who has been made a defendant by interpleader, is by answer, disclaimer or failure to plead at all, not by motion to set aside or modify the order of interpleader. Such order may be made by the court on the affidavit of the principal debtor and it is not for any alleged claimant to question that order.

Burch & Johnson, for plaintiff.

A. J. Cunningham and L. P. Bane, for Bruns.

Corporation Counsel, for Cincinnati.

Gorman & Thompson, for Mueller & Kemp.

F. F. Dinsmore, for McClure.

Bromwell & Bruce, for Jones & Co.

DEMPSEY, J.

Plaintiff filed its petition in this case originally against the city of Cincinnati and McCarron and Dawson, a firm, alone, wherein it averred

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that on January 11, 1898, the said city entered into a contract with said firm for the construction of the Bloody Run sewer; and that on February 21, 1898, said firm assigned and transferred to said plaintiff all their right, title and interest in said contract, in consideration of which plaintiff was to make certain advancements to said McCarron and Dawson; that said McCarron and Dawson have completed said contract and the same has been accepted by the said defendant, the city of Cincinnati, and a final estimate issued by the engineer of said city of \$11,185.89, as the amount still due under said contract; that on April 21, 1889, said city paid plaintiff the sum of \$2,625.57, but refused to pay the balance of said estimate or any further sum to plaintiff; that there is still due to plaintiff from said city the sum of \$4,694.08, which said city refuses to pay, and for which said plaintiff prays judgment with interest from April 20, 1899.

The city of Cincinnati, through its corporation counsel, filed an affidavit in this case under sec. 5016, Rev. Stat., wherein it averred that the subject of the action was money in its hands and that without collusion with the defendants, McCarron and Dawson, the various other defendants make a claim upon said fund and such other averments as are required by said section, and then prays that said claimants may interplead and settle their claims among themselves.

Thereupon an order was made that upon payment by said city of the sum of \$8,560.32, the amount claimed in the petition to be still due from the city to the plaintiff and the other claimants to the fund, within twenty days from the date of the order, the said city should be discharged from liability to either the plaintiffs, McCarron and Dawson, or any of the other parties, in respect to said sum so paid. It was also ordered that a copy of the order be served on all of the averred claimants, requiring them to appear before this court on or before July 1, 1899, and maintain whatever claim they may have to said money, or relinquish the same.

It will be observed that the order does not specially designate that this money shall be paid into court; evidently an omission in drafting the same, for on June 19, 1899, a second order was made reciting that said city had paid to the clerk of this court said sum of \$8,560.32, in accordance with the former order and discharging it from all and future liability to the parties in regard thereto.

All of the alleged claimants answered except the firm of McCarron and Dawson.

Previous, however, to filing an answer, the defendant, George H. Bruns, filed a motion herein and two demurrers, which, by consent of counsel, are to be disposed of before considering the case on the facts.

One demurrer is to the petition of the plaintiff, for the reason that it does not state facts sufficient to constitute a cause of action against

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him; nor to entitle it to relief sought and prayed for against him; nor to require him to interplead to the petition.

Of course this demurrer must be overruled, for the petition was not framed against this defendant at all, nor is any relief prayed by it against him; nor does nor did plaintiff ask this defendant to interplead. Plaintiff's action was a simple action at law, which, involuntarily on its part, and by the action of the city of Cincinnati, was converted into an equitable action, where all parties are actors and all parties defendants; and where each is asking the enforcement of rights in a common fund.

The second demurrer is to the petition also, on the ground that it does not state facts sufficient to constitute a cause of action against the city of Cincinnati nor this defendant, nor any right to recover any part of said fund, upon which this defendant (Bruns) levied his mechanic's lien.

Waiving the question whether this defendant has any right to test the sufficiency of the petition against the city, it is sufficient to say that it does state a cause of action against the city. There is nothing in the petition which shows any claim against this defendant, to the fund in ~~cont~~ oversy, and of course, in the absence of such averments, on demurrer, the court has nothing to pass upon, but must overrule the same and leave the question to be settled upon future pleadings and the evidence.

The motion filed is to set aside or modify the entry of the order of interpleader and six reasons are assigned. The first is because the subject of the plaintiff's action is not claimed by Bruns. The proper way to set that up is by answer, or disclaimer, or failure to plead at all. The order may be made by the court on the affidavit of the principal debtor, the one holding the fund, and it is not for any alleged claimant to question that order.

The second ground is because the entire amount of plaintiff's claim is \$4,694.03, which is the entire value of the subject of this action, and therefore the city could not ask for interpleader for a sum greater than plaintiff's claim, viz: \$4,694.03.

The language of the statute is that if the defendant makes affidavit that, "a third party * * * has or makes a claim, to the subject of the action, etc.;" the subject of the action is not necessarily the specific amount sought to be recovered by the plaintiff; it is in reality the amount that is due on the contract itself, a part of which amount plaintiff claims himself. Plaintiff alleges the whole amount due, and prays a judgment for part of it. We see no reason, where there are conflicting claims to the whole amount due, which render it unsafe for the party liable to determine whom to pay, why he may not avail himself of the provision of this statute even though plaintiff claims a part only.

The third, fourth and fifth grounds of the motion being confined to allegations of inadvertence on the part of the court in making the order, and in releasing the city from liability, it may be said, inasmuch as I

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made the order, that they were all made in accordance with the statute and upon the evidence that the statute authorized.

The sixth ground is really a motion to order the clerk to repay the money to the city. The motion in general is overruled, for want of legal merit on all of the grounds alleged. As was stated before, Bruns filed an answer and cross-petition which, with the evidence thereon, was to be considered in case the demurrer and motion was overruled. A special reply was filed to the answer and cross-petition of Bruns; and one single reply, with several counts, to the answers and cross-petitions of the other claimants. It will not be necessary to set forth these pleadings at length, as the facts necessary to the decision of this case will sufficiently appear in the conclusions on the evidence made herein.

From the evidence it appears that the said firm, McCarron and Dawson, did, on January 21, 1898, contract with said city for the construction of said sewer, that they completed said contract, and that at the beginning of this action there was the sum of \$8,461.82 still unpaid by said city on said contract. The petition in this case was filed April 26, 1899. In order to carry on this work it was necessary for McCarron and Dawson to have money, and in order to procure the same they entered into an arrangement with the plaintiff to furnish it, and, to secure such advances as might be made, executed and delivered to plaintiff the following instrument in writing on the date specified therein, viz:

"In consideration of certain advances to us made by the Franklin Bank we hereby transfer and assign to the said bank as collateral security all of our right, title and interest in the contract entered into by us with the city of Cincinnati on January 17, 1898, for the building of what is known as the Bloody Run sewer.

In witness whereof we have hereunto subscribed our names, this 28 February, 1898.

McCARRON & DAWSON,
FRANK McCARRON,
WM. C. DAWSON.

This instrument was filed with the board of administration of the city of Cincinnati on the day of its date. At the time of the execution, delivery and filing aforesaid of this instrument, none of the others interpleaded defendants herein had furnished any material to McCarron and Dawson, or were entitled to any claim on any funds that might have been due to said firm under their said contract.

In pursuance of this agreement or assignment, the said bank advanced, from time to time, moneys to said firm of McCarron and Dawson, and McCarron and Dawson in turn made various payments to the bank, among which payments are included all of the partial estimates allowed by the city of Cincinnati as the work progressed, and which on April 8, 1899, aggregated \$24,058.44. The total cost of the work was

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to be \$36,199.84; from this was to be deducted the amount paid by the city for advertising and inspection, the sum of \$955.50, leaving the net cost of the work \$35,244.33. Deducting from this the estimates allowed to that time and collected by the bank under its said assignment, and there still remained due on this contract the sum of \$11,185.89. By this date, April 8, 1899, all of the interpleaded defendants herein had filed notices and claims to this balance, under the mechanics' lien law, which claims amounted to the sum of \$7,782.11. To this amount the corporation counsel added ten per cent. to cover probable costs, etc., making a sum total of \$8,560.33, which, under agreement with the bank, was retained by the city of Cincinnati to await the result of the litigation between the bank and the claimants; and the balance, \$2,625.57, was paid over to the bank, under its said assignment. This makes in all paid to the bank under this contract the sum of \$26,584.01. The bank claims to have advanced some \$37,000.00 to McCarron and Dawson; whether all on this contract or on a neighboring contract, does not clearly appear from the evidence now in this case. The bank, however, sues for only \$4,694.03 and interest, thus showing that payment on the advances made by the bank were also made by McCarron and Dawson from other sources than the estimates allowed on this contract. Although the assignment of the contract, recited above, was filed with the board of administration on the day of its execution, the evidence is conclusive that the firm of McCarron and Dawson never relinquished nor divested themselves of the actual and active prosecution and execution of the work provided for in the contract, and that no actual express notice was ever given or received by the impleaded defendants herein that said original contract had been assigned by them for any purpose whatever. It is clear to the mind of the court that none of these defendants had any actual knowledge of this assignment.

The defendant, John Mueller, had a contract partly oral, partly written, with said McCarron and Dawson, whereby and whereunder, on April 11, 1898, he began to supply said firm with sewer pipe, sewer slants and cement, to be used in the construction of said sewer; and which supplies were completed on January 19, 1899; and on which last day, therefore, payment became due; on said last day there was a balance owing to this defendant of \$1,867.56. On January 25, 1899, Mueller filed with the city his sworn and itemized account of the amount and value of said materials pursuant to the mechanics' lien statute and filed a copy thereof with the recorder of Hamilton county, Ohio, and also a copy with McCarron and Dawson. The account was not disputed by McCarron and Dawson within the ten days provided by the statute. So that it follows, were there no other questions in the case, that this defendant would be entitled to be paid out of the subsequent payments that were to be made to said McCarron and Dawson under said contract.

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The defendant Kemp had an oral agreement with said contracting firm to furnish sand, under which contract he began to deliver sand on April 1, 1898, and completed the same on January 22, 1899, on which day there was a balance due him of \$342.80. On March 8, 1899, this defendant filed with said firm, said city and the recorder of Hamilton county, Ohio, the various notices and affidavits required by law; and the account being undisputed for ten days, he has, no other question intervening, acquired a right to be paid out of the subsequent payments to become due to said contracting firm.

As to the defendant, T. F. McClure, the conclusion the court reaches on the facts are these: On February 11, 1898, McCarron and Dawson entered into a contract with McClure and McManigal, a firm, whereby said last named firm was to sell and deliver all of the vitrified sewer brick to be used in the construction of said sewer, for which McCarron and Dawson were to pay the sum of \$9.50 per thousand; that thereafter McManigal assigned and transferred to T. F. McClure, the defendant herein, and who was the other member of the firm of McClure and McManigal, all of his interest in said contract for the vitrified brick, and all his right to any money arising thereunder, the said McClure to perform the terms of said contract as if the same had been made by him; all of which was accepted by McCarron and Dawson. This contract was as follows:

"We hereby propose to furnish you with what vitrified sewer brick you may need for the construction of Bloody Run sewer at \$9.50 per thousand, delivered along the line of the work. Brick to be acceptable to the engineer in charge of work, you to pay the freight and wharfage as the brick are delivered and 75 per cent. of the balance per month on estimate for what brick are used and also any estimate that may be received for brick on hand, balance to be paid when final estimate is received; brick to be counted as delivered and any culls deducted in final settlement."

Under this contract the brick were brought to this city by rail and barge between the first of April and the first of August, 1898, and were hauled out along the line of the work and piled up. The contractors resorted to the piles as brick were needed, using the last from the piles on January 19, 1899. On April 19, 1899, McClure was notified by the contractors that there were 2,280 brick, which were returned to him unused and as still belonging to him. The amount of brick claimed to be delivered under the contract was 373,528, for which, after deducting cash credits, and a credit for the 2,280 unused brick, there is due to McClure the sum of \$793.69, which he claims with interest from March 1, 1899. On said March 1, 1899, McClure filed with the city and with McCarron and Dawson, and with the recorder of Hamilton county, the various notices and accounts required by law, and, ten days having elapsed without

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objection, he claims the right of payment out of the future payments due to McCarron and Dawson.

His right to participation, not noticing now any other question, is denied on the ground that the completion of his delivery of brick under his contract was made August 16, 1898; hence his notices and affidavits were not filed within either within sixty or ninety days after said completion of delivery; that is, under either the old or the new mechanics' lien law, the new one being the one lately declared unconstitutional.

McClure's contention is that his delivery was not completed until January 19, 1899, the day the last brick were used by the contractors. The determination of the question depends on the proper construction of the contract between McCarron and Dawson, and McClure and McManigal, as read in the light of all surrounding circumstances. The structure into which the brick were to be placed was of some considerable length; the time in which it was to be completed was uncertain; the quantity of brick to be used could not be fixed in advance because of the nature and length of the work; it was to the convenience and advantage of the builders, and they so stipulated, that the brick should be delivered along the line of work; the quality of the brick was to be the acceptance of the chief engineer of the city in charge of the work.

Now, while the word "delivered" is used in this contract, it does not seem to me, when interpreted in connection with the foregoing circumstances, that it is entitled to the full significance of intending a change or transfer of title and ownership at the moment any quantity of the brick were placed along the line of the work. The condition that the brick must be acceptable to the engineer in charge negatives any such construction as that. Delivery, in its legal significance, comprehends two notions; a tender of the goods on the part of the vendor, and an acceptance on the part of the vendee. When these two acts concur, title is transferred. Now, while in an ordinary contract of sale, acceptance on the part of the vendee may in effect be compelled by a suit to recover the contract price, after tender of the article sold (*Shawhan v. Van Nest*, 25 Ohio St., 490, 498; *Cullen v. Bimm*, 37 Ohio St., 236, 238), I do not see how this can be effected when there is a condition intermediate between the tender and the time for acceptance, and which must be complied with before the vendee can be even asked to accept. The delivery contemplated by the mechanics' lien law, is such a delivery as vests in the head contractor the title or ownership of the materials for which a lien or claim to priority is sought. Judge Holmes, in his notes Y to Z, star page 492 of 2 Kent's Commentaries, 13 Ed., says that the legal requirements to the passing of title are: "(1) That the chattels shall exist and be owned by the seller, at the time when the title is to pass; (2) that they shall be specified; (3) that there shall be a mutual assent of buyer and seller to the passing of the title to the chattels so specified. . The assent must in legal contemplation exist when the title

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is to pass. * * * So the passing of the title may be the subject of condition; in the case of unspecified goods no title can pass until there is an identification, and an assent of both parties to the passing of the title to the goods as identified."

The case at bar is a case of unspecified goods; the identification required was the inspection and approval of the city's inspecting engineer; until that was had no title passed in the brick to McCarron and Dawson and hence there was no completed delivery until such approval. The delivery along the line of the road was a simple tender by McClure, which was not accepted or active until the engineer had performed his duty. The evidence shows that the engineer inspected and decided as the work progressed, hence final delivery was not accomplished until final inspection, which the evidence shows was January 19, 1899. Hence the court holds that delivery by McClure was not completed until that date, and his affidavit and notices were consequently filed in time to intercept any future payment to McCarron and Dawson.

As to the claim of L. Jones & Co., the evidence shows they had a running account with McCarron and Dawson; that they furnished certain iron castings during September and October, 1898, which were used in the Bloody Run sewer, the last of these items being of date October 25, 1898; that at this time and subsequently McCarron and Dawson were also engaged in the construction of what is known as the Observatory road improvement, and that on January 5, 1899, Jones & Co., at the request of McCarron and Dawson, given by telephone, furnished to them a large iron casting or steel plate to be used somewhere not precisely located by the evidence. These defendants claim \$98.00 as the balance due on said account. On March 6, 1899, they filed with the city and McCarron and Dawson and the recorder of Hamilton county, the various affidavits and notices required, and, ten days having elapsed without objecting, they claim a lien for the \$98.00.

The evidence I think conclusively shows that the plate ordered January 5, 1899, could not by any possibility be needed, or be of any use or value in the construction of Bloody Run sewer, but could be of use on Observatory road; and the evidence tends to show that such a plate was used in the covering of a well hole in the vicinity of property belonging to John L. Stettinius. The evidence certainly satisfies the court, that the plate was not furnished for the Bloody Run sewer and therefore is not entitled to be charged against it. Eliminating this item from the account, and the last item of the account stands as of October 25, 1898, with the affidavit and notices of date March 6, 1899, a period of more than sixty or ninety days, whichever limitation be accepted as proper, and these defendants necessarily fail to secure any right to this fund under the statute.

George H. Bruns' claim is for common brick furnished in the construction of this sewer, under a contract on which is due the sum of

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\$5,158.06, with interest on \$2,384.50, from January 29, 1898 and on \$2,773.50, from April 8, 1899. His contract was completed in January, 1899, and on the twenty-fifth of that month and year, he took the necessary steps to secure his claim. The contract price was \$6.00 per thousand. The objection made to this claim is that 55,000 of the brick claimed to be furnished under this contract were in reality used by McCarron and Dawson in a second sewer, known as the Rockdale Avenue sewer. This is testified to positively by McCarron and Dawson and not denied (page 104, record). Bruns himself testifies that he knew when McCarron and Dawson built the Rockdale Avenue sewer and that they took some of his brick to build it with, the quantity he did not know, and that the brick taken for that purpose were included in the lien taken on the Bloody Run sewer funds. He says he didn't furnish the brick on the work, but on the cars; that McCarren and Dawson hauled the brick and he supposed they could haul them where they saw fit. The work was estimated to require 1,900,000 brick and he furnished 1,849,000. He took a lien for that amount, although some of them he knew went into Rockdale Avenue sewer. He had no contract to furnish brick for the Rockdale Avenue Sewer. Dawson sent him word once to ship faster and Bruns went down to the work and saw him, and said to him: "Dawson, you have a lot of brick up there on the street, why don't you haul them down where you need them?" Dawson said he would use them up there on Rockdale Avenue; Bruns did not object to that nor did he find any fault with him, although he knew these were his brick; never spoke to McCarren about it. He knew they did use these brick, but he did not know when they were going to use them. He learned it when he first saw them piled along the work.

This is the substance of the evidence on the point. It is an admitted fact that 55,000 of these brick went into Rockdale Avenue sewer and that Bruns knew they were going into it, but the brick had passed out of his control and possession then; and it is questionable, to say the least, what he could have done to prevent it. The approximate number required in Bloody Run sewer was 1,900,000, and there is no evidence that Bruns was acting in other than good faith while he was engaged in delivering under his contract.

The question arose in *Beckel v. Petticrew*, 6 Ohio St., 247, between an owner and a material man directly furnishing the material, and it was held that what is now sec. 3184, Rev. Stat., extends a lien on all material in good faith furnished for the erecting or repairing of a house, etc., *

* * notwithstanding a part of the material may subsequently be otherwise appropriated without the consent of the party furnishing it. In *Esslinger v. Huber*, 22 Wisc., 63, and in *Bender v. Stettinius*, 10 Dec. Re., 186, decided by Judge Taft, it was queried how far the rule laid down in *Beckel v. Petticrew*, *supra*, was applicable as between material men, the material of one of whom was used while another's was diverted. The

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contention of the plaintiff herein, is that Bruns consented to the diversion, and that constituted a new and independent contract for this 55,000 brick.

I am unable to accede to that view of the case, for I don't think the evidence justifies it. As to whether there is any superior equity in the bank to entitle it to call for an abatement of Bruns' claim under his lien, I am also unable to see that. In the absence of the statute Bruns would have no greater claim than any one else on this fund. The material wording of sec. 3193, Rev. Stat., which protects the right of sub-contractors and sub-material men, is substantially the same as sec. 3184, Rev. Stat., and would confer what we designate a sub-contractor's lien upon a material man who had in good faith furnished material, although the same was subsequently diverted by the head contractor. And I know of nothing outside of fraud or collusion or bad faith, or something of that nature, that would postpone him. This lien being of statutory origin, a compliance with the statutory formalities vests the lien in those who are within the pale of the statute's protection; and our Supreme Court has defined those persons.

Brun's, as I read the evidence, falls within the privileged class and is entitled to be protected out of the fund to the full extent of the brick furnished by him, and without any abatement for the 55,000 brick deflected to Rockdale Avenue sewer. I confess I come to this conclusion with reluctance and much hesitation, for it does in some respects seem unjust and often may result inequitably, but it seems to me the remedy lies with the legislature.

Overshadowing, however, the claim of all these alleged lienholders, is the contention of the bank, that its assignment of February, 1898, takes precedence over all of them. In this I am unable to agree with counsel. There is no question that under the act of 1843, S. & C. 883, this claim on the part of the bank would be sound, for the decision in *Copeland v. Manton*, 22 Ohio St., 398, decided in 1872, is to that effect; it having been held in that case that a sub-contractor, by the service of the notice provided in said act, was subrogated only to the rights of the contractor; and where whatever was due to the contractor had been in good faith previously assigned by him to another sub-contractor, the assignment was not defeated by the service of such notice; and where, in a suit between all the parties interested, the amount due on the contract by the owner is brought into court, the assignee is entitled to have the same adjudged to him. And this, under statutes of like character with this act of 1843, was the uniform holding of the courts, it having been held in New Jersey, even as late as 1892, in *Board of Education v. Duparquet*, 50 N. J. Eq., 234, that an assignment by the contractor not only of monies due, but of monies to become due, if founded on a valuable consideration, was good as against the subcontractor or material man. See *Boisot on Mechanics' Liens*, sec. 846-847. That was the

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rule in New York, as early as 1850, the only exception allowed being that sub-contractors and material man were permitted to assert their claims and stop the funds due on the contract as against an assignment, by the contractor for the benefit of his creditors. *Mandeville v. Reid*, 13 Abb. Pr., 173 (1850); *Otis v. Haley*, 1 Daley, 338 (1863); *Smith v. Bailey*, 8 Daley, 128 (1878).

In May, 1863, the law in New York was amended, whereby it was provided that "no transfer or assignment of his interest in the contract by the contractor should be valid as against parties entitled to file liens under said contract against said contractor;" and in *Develin v. Mack*, 2 Daly, 94, it was held under this amendment, that as the contractor's engagements are based upon the amount of his contract, his workmen had the right to rest in security upon it and the means provided by law to insure its application to their demands. In other words, *the contract became at once a letter of credit and a security*.

The year before the decision in *Copeland v. Manton*, *supra*, which arose under the act of 1843, our own legislature had passed an act similar to the New York act of 1863, whereby, after sundry provisions with reference to subcontractors and material men, it provided, in sec. 3, that "any assignment or transfer by such contractor (*i. e.*, the head contractor) of his contract with or claims arising thereunder against such owner * * * shall "save and be subject to the claims of every such mechanic or other person so performing such work, or furnishing such materials." 68 O. L., 107.

In 1877 the mechanics' lien laws of Ohio were revised and codified, and by sec. 16 of the act of that year, 74 O. L., 168, a similar provision was made, that "Any assignment or transfer by said head contractor of his contract with said owner * * * shall save and be subject to the claims of every laborer, mechanic or sub-contractor or material man who has furnished any labor, material or machinery toward the construction, alteration, removal or repair of any property designated in this act."

This provision was carried into the revised statutes of 1880 as part of sec. 3203, with the insignificant change of the indeterminate adjective, "any" into the indefinite article "an;" and it still remains as a part of said section.

Plaintiff admits the force and effect of this provision, but contends that it applies only to assignments or transfers made *after* material has been furnished or labor performed and cannot operate to invalidate assignments or transfers made *before* such materials were furnished or labor performed.

Plaintiff bases this argument on the wording of the section which says that those whose claims are to be saved are every laborer, etc., * * * who *has furnished* any labor, etc., his contention being that this phrase, "who has furnished" indicates an intention on the part of the legislature to limit the class of protected persons. But I am unable to read the section in that way, when I view it in the light of what the

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old law was, the evils that arose under the old law and the remedy that was sought under the new enactment.

Under the old law all assignments were valid except assignments for creditors, with the result that those whose toil and property went to improving and enriching another man's land were side tracked for the benefit of some outside creditor; and the words used in designating the assignments that should fall under the ban of the amending statutes, viz., the words "any," and "an" are sufficiently comprehensive to include all assignments of whatever nature or character they be or at whatever time made, unless modified by the words suggested by plaintiff's counsel. But those words, it is clear from an inspection of other provisions of the lien statute, were not intended to designate or fix qualifications of time with reference to the assignments that were to be governed by the act. They are intended as *descriptio personarum*, as a designation of the individuals intended to be covered by the section. It is not every contractor, or sub-contractor, or material man, who is entitled to the benefit of the provisions of the lien law even though his labor or material may go in some degree into another man's building or structure. The labor or materials must be furnished under the conditions specified in either sec. 3184, or 3198, Rev. Stat., and the phrase relied upon by counsel is evidently intended to do no more than cover the persons provided for in section 3198. To give this section any other interpretation would be to construe away the protection intended by it for sub-contractors and material men. The contract of the head contractor, instead of being "a letter of credit and a security" to the sub-men, would in fact become but "a delusion and a snare." Secret assignments, such as in the New Jersey case, *supra*, would absorb in advance, and before opportunity could come to the subcontractors to protect themselves under the provision of the statute, all that was intended to be retained for their protection. My judgment is, that the statute intended to preclude all assignments by the head contractor of his contract, irrespective of the nature of the assignments or of the time when made, with reference to the work and labor performed, or materials furnished by laborers and material men. Having reached this conclusion it follows, in my judgment, that the rights of the plaintiff under its assignment must be subject to the claims of the interpleaded defendants herein, whom the court has found to have fixed their claims in conformity to law.

I have examined carefully the case of *Bullock v. Horn*, 44 Ohio St., 420, and *Stark v. Simmons*, 54 Ohio St., 435, and find nothing in either case that would, to my mind, necessarily alter the conclusion in this case. *Bullock v. Horn* would be, if anything, in harmony with the views I express herein, for it was a case where the court denied the right of the owner to set off a claim against the contractor so as to bar a lien claimed by a laborer under said contractor, when such set off did not grow out of the original contract and was acquired by the owner

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after the labor of the lienor was obtained although before notice that the laborer's claim had not been paid.

Stark v. Simmons, *supra*, is in effect but an enunciation of the rule that a subcontractor's rights against an owner can be no greater and rise no higher by reason of the statute, than the rights which the contractor himself would have against the owner under his contract. In this case, at and before the original contract, the contractor was indebted to the owner in a sum equal or nearly so to the amount to become due under the contract, and the court held that the two claims, as between owner and contractor, compensated each other; there was nothing left for the sublienor to attach a claim to; and the court says that the lien law does not, for the purpose of creating a fund to which they (subcontractors) may resort, enlarge the owner's liability to the contractor, as it may be fixed by the terms of his contract, and by the rules of law relating to the subject. In both of these cases, the question arose between the owner and the subcontractor and in no wise was an assignee of the contractor involved.

While I have examined the case of Hamilton v. Stillwaugh, 5 Circ. Dec., 324, I have not relied on it as an authority for the conclusion reached by me inasmuch as it is not certain, from the facts set forth in that case, when the assignment therein was made, with reference to the time when the work was done by the subcontractors who took out liens subsequently to such assignment and such liens were given priority. *I have reached my conclusion on an interpretation of the statute as I read it.* The claims allowed herein are:

John Mueller, \$1,367.56, interest from January 19, 1899. Lien effective from January 19, 1899.

Henry J. Kemp, \$342.80, interest from January 22, 1899. Lien effective January 22, 1899.

Geo. H. Bruns, \$5,158.06, with interest on \$2,384.50 from July 29, 1898, and on \$2,773.50 from April 8, 1899. Lien effective January 25, 1899.

F. F. McClure, \$796.69, interest from Mar. 1, 1899. Lien effective March 1, 1899.

No opinion is intended to be expressed one way or the other on the constitutionality or implied repeal of the various provisions and sections of the lien law of 1894, it not being necessary to the decision of this case.

The one doubt I have in this decision is as to the allowance for the 55,000 brick permitted to be included in Bruns' claim. I have not been able to find an authority on the point which squarely meets it, and the only principle that I find is the doctrine of good faith in the delivery, enunciated in Beckel v. Petticrew, *supra*. Possibly counsel may be more successful.

A decree may be taken in accordance with this opinion.

Glesenkamp v. Radel.

PERSONALTY—SPECIFIC PERFORMANCE.

[Superior Court of Cincinnati, Special Term, 1900.]

GLESENKAMP ET AL. V. RADEL.

1. PERSONAL PROPERTY—RULE AS TO SPECIFIC PERFORMANCE.

Specific performance of contracts relating to personalty will not ordinarily be decreed. Exceptions to this rule have been made when the value of the chattel withheld was peculiar to itself, or where damages in money could be ascertained, or where the detention could not be adequately redressed by damages.

2. RULE APPLIED—ADEQUATE REMEDY AT LAW.

Where vendee of personalty, who had disposed of same so that it could not be replevined, agreed to sign notes and give a chattel mortgage, and refuses to do so, this constitutes a breach of his contract, for which a suit for damages will lie; and the measure of damages would be the price of the property sold. There is, therefore, in such case, where it does not appear that vendee is insolvent, a full, complete and adequate remedy at law.

B. B. Tuttle, for demurrer.

Jones & James, contra.

HEARD ON DEMURRER.

DEMPSEY, J.

The demurrer to the petition, I think, ought to be sustained.

Specific performance of contracts relating to personalty will not ordinarily be decreed.

Exceptions to this rule have been made when the value of the chattel withheld was peculiar to itself, or where damages in money can not be ascertained, or where the detention could not be adequately redressed by damages.

There is nothing in the facts alleged in the petition, however, to take this case out of the general rule. It is true they argue they cannot replevin because they have sold the old hearse and cannot restore it. But that is not a finality to their rights. Radel agreed to sign notes and give a chattel mortgage. This he refused to do. This is a breach of his contract, for which a suit for damages may be had at once, and the measure of recovery would be the price of the hearse sold and delivered to him. See Stephenson v. Repp, 47 Ohio St., 551.

There is no allegation that Radel is insolvent or worthless on execution. From all that appears plaintiffs have a full, complete and adequate remedy at law.

Demurrer sustained.

FOREIGN WILLS—PROBATE.

[Franklin Common Pleas, 1900.]

FLEMING V. HOFFMAN ET AL.**1. WILL SHOULD BE PROBATED FIRST WHERE TESTATOR RESIDES.**

The will of a resident of another state does not operate to pass title to property in Ohio by being admitted to probate in this state until duly probated in the state where testatrix was a resident at time of her death.

2. ORIGINAL PROBATE IN OHIO—TESTATOR RESIDING IN WEST VIRGINIA.

Where a testatrix residing in West Virginia made a will and continued a resident of that state until her death, the original probating of her will in Ohio is void and passes no property right to legatees claiming under such will.

*M. E. Thraillkill, P. S. Lowery and W. T. S. O'Harra, for plaintiff.
Joseph H. Outhwaite, G. J. Marriott, Thomas H. Rickets, C. D. Saviers and J. G. McGuffey, for defendants.*

In 1891, Margaret Fleming of Brooke county, West Virginia, made a will disposing of about \$125,000.00 worth of property and appointing Ripley C. Hoffman her executor, and directed that said will should be probated at Columbus, Ohio; in May, 1891, she died in West Virginia where she had continued to reside until her death and said will was probated within a few days thereafter in probate court of Franklin county at Columbus, Ohio, and Ripley C. Hoffman was appointed executor as therein directed by probate court of Franklin county, Ohio, and thereupon collected the assets of said estate and distributed all but about \$24,000, for which he failed to account. This action is brought by one of the legatees against said executor and his bondsmen to recover the amount of a legacy that has not been paid as provided by said will. After plaintiff had introduced the records and evidence showing above facts defendants interposed a motion for nonsuit.

BADGER, J.

It seems to me that you strike the keynote in these cases when you come to the jurisdiction of the probate court in admitting the will to probate in Franklin county. It is well understood by all lawyers that wills are creatures of the statute, and divert property, or may at least divert property, from the ordinary channels in which it would descend were it not for the power conferred by the statute on persons to make wills. Being of that nature, I think our courts have uniformly construed with strictness all the acts that are necessary to validate a will, so that to make a will an instrument of any validity it must show fully, in the making and the probate, that all the requirements of the statute in relation to it have been complied with substantially. Courts can not read into the statutes of wills that which is not put there by the legislature.

Now in this case, there is a double question which comes up as to the bond, the validity of it, or the liability of the sureties on this bond;

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by reason of waiver or otherwise might be one question that would come up if this suit had been brought by one of the legal heirs. The allegations of the petition show that it is not brought by a legal heir or creditor, but by one who had a legacy under the will. If the will is invalid or not properly probated the legacy of course would fall with it.

The plaintiffs in this case are not bringing the action as heirs at law of the decedent, so it would make no difference even though this bond were a valid, legal instrument, sufficient to bind the bondsmen; the plaintiffs here would have no standing unless they show that the will has been duly probated according to the provisions of the statute. One question is as to the right of the plaintiffs to maintain this action even though the bondsmen were liable to the legal heirs or creditors.

It seems to me that the keynote to this case is whether this will has ever been legally probated; if it has not, no matter what the liability of the bondsmen may be as to heirs or creditors, the plaintiffs have no standing.

There is no provision in the laws of Ohio that, by any stretch of construction, any court could give, would inject any vitality into an instrument calling itself a will made by a person residing in a different state from Ohio, and originally probated in a county in Ohio.

On the evidence offered by the plaintiff in this case, the defendants interpose a motion to dismiss for various reasons, one of which is that the plaintiffs in the case show no legal capacity to maintain this action. In other words that they fail to show that they have any right to any portion of the estate of Margaret Fleming, deceased. Their claim is based wholly upon the will of Margaret Fleming, deceased, which will is introduced with the order of probate and is in evidence. It occurs to my mind that the evidence most clearly shows that Margaret Fleming, at the time of her decease, was a resident of Brooke county, West Virginia; that the evidence and the pleadings show that the will was never probated in Brooke county, West Virginia, but that there was an attempt to probate it in Franklin county, Ohio. The will itself reciting that the residence of the decedent was Brooke county, West Virginia; that said will was executed in West Virginia some ten days or perhaps two weeks before the probating or filing of the same in Franklin county, Ohio, probate court.

As the will is purely the creature of statute it can have no validity or effect except such as is given by the statute and to divert property from the natural course of descent by reason of a will all the requirements of the statute must be substantially complied with. It is unnecessary to recite the general provisions as to wills, all of which must be complied with before a will can give a legatee thereunder any title to testator's property. Now it is contended by the plaintiff in argument that inasmuch as the statutes of Ohio do not prohibit the

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filing and probating of a will made by a resident of another state that it may be probated in Ohio. The argument of counsel on the other side certainly has force in that the probate court is a court of limited jurisdiction, has jurisdiction only where it is conferred by law, would seem to answer that to my mind. But counsel for the defendants also cite sec. 5942, Rev. Stat., providing no will shall be effectual to pass real or personal estate unless it shall have been duly admitted to probate or record as provided by statute.

It seems to me that even if the probate court was a court of such jurisdiction that it might admit such will to probate unless prohibited by statute here is a direct prohibition by the statute on that point. Now there is no authority in law of wills to give a person a right to change the general law governing such matters. A person making a will is still subject to the general laws governing the subject and may not direct, as was attempted to be done in this case, where the will should be probated. The statute fixes the place where a will may be probated and if it were possible for one to direct where her will should be probated it might be possible that the testatrix would direct that the will should not be probated at all, and should have force and effect without ever being probated. We all recognize that can not be done, and I think on examination that we will all recognize that it is not within the power of the testator to direct where a will shall be probated. He may only make his will in accordance with the law. If he has made it substantially in accordance with the law, the law directs where it should be probated. The will is of no effect, validity or force until it is probated according to the statute that gives the power to admit to probate and record in such matters. The law governing wills can not be confused with that as to deeds. The execution of a will by a testator gives no right to the legatee to any property described in that will, or devised by that will until after the death of the testator and not then until its admission to probate by the proper court.

I do not think it necessary to dwell on the evidence as to the residence of Margaret Fleming. The will itself recites that. The record also recites that. I do not think you could make it any plainer by saying "Margaret Fleming, late a resident of Brooke county, West Virginia," than is recited in the will and record "Margaret Fleming, late of Brooke county, West Virginia." What other legal meaning has the expression "Late of a certain state" or territory than that that person was a resident of that state or territory designated. It can have no other legal meaning in the record. I was glad to hear the remarks of one of the counsel in the argument in this case in a general way as to the admission of wills to probate. There has grown up in Ohio—I do not know how general it is throughout the country, as suggested by counsel in his argument—a very loose practice in the admission of papers purporting to be wills to probate in the state of Ohio. The probate judges

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are not all lawyers and I take it to be the experience perhaps of the practicing members of the bar, that those lawyers, lawyers in name only, we find too often occupying the bench in the probate judges office usually are no more careful than the ones that have never been admitted to the bar, as to admitting alleged wills to probate.

It was only during this term of court that a case was on trial in relation to real estate of Jesse Rush, deceased, showing that a will had been admitted to probate having been signed by two alleged witnesses although it had never been signed by the testator; and several other instances equally as ludicrous I could cite where wills have been admitted to probate in Ohio. And the fact that this will directs that it shall be admitted to probate in Franklin county may have influenced the probate court in acquiescing in doing something which, if he had consulted a lawyer who had examined into the question would have told him, was absolutely void and gave it no effect. The testatrix might as well have directed that the will would be operative without ever being admitted to probate. Such loose practices on the part of probate judges are to be censured the more for the reason the statutes and the decisions of our circuit and Supreme Courts are very clear in all such matters.

Therefore in this case it is not necessary for the court to determine whether or not the defendants, the bondsmen of Ripley C. Hoffman are estopped from denying a recovery against the persons legally entitled to the proceeds of the estate of Margaret Fleming, deceased. It is sufficient to say that the plaintiffs in this case show no legal right to recover any portion of the estate of Margaret Fleming, deceased, for the reason that the pleadings and the evidence show that the will of Margaret Fleming, deceased, has never been legally admitted to probate.

ACTIONS FOR WRONGFUL DEATH.

[Montgomery Common Pleas, November 3, 1900.]

JACOB WITTMAN'S EXECUTRIX v. C. H. & D. R. R. Co.

EXECUTOR MAY BRING ACTION FOR WRONGFUL DEATH.

The words "personal representatives" as used in secs. 6134 and 6135, Rev. Stat., relating to actions for wrongful death, mean executors and administrators. Therefore an action under the statute in question may be brought by the executor of the person so deceased.

DEMURRER TO PETITION.

T. B. Hermann and Craighead & Craighead, for plaintiff.

R. D. Marshall, for defendant.

BROWN, J.

This cause comes before the court on a demurrer to the amended petition, on the ground that upon the face of the amended petition it appears that the plaintiff has no legal capacity to sue.

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The petition sets out the usual averments, the appointment and qualification of Clara H. Wittman as executrix of the estate of Jacob Wittman, deceased.

Counsel for the defendant contend that under secs. 6134 and 6135, Rev. Stat., an executrix cannot maintain an action and has no legal capacity to sue, and that the only person who can bring such a case is the administrator or administratrix.

Counsel for defendant also contends that the executrix is the trustee only of the deceased person for the purpose and to the extent provided in the will, and that the will directs and gives the executor whatever power he may have to administer and distribute the estate of the deceased, while the administrator or administratrix is the representative or trustee of the deceased for the purpose of administering the estate according to law; that the executor or executrix executes the will of the deceased according to the terms of the will; that the administratrix or administrator administers the estate of the deceased according to law. And then, by virtue of this statute, he is the trustee and in his name a suit can be prosecuted to recover damages by the next of kin for the wrongful death of a party.

There is no case in the state of Ohio which exactly covers this point and as the question has been frequently mooted and discussed, counsel and the court have made rather thorough investigations.

I find that the general form of the statute has been copied from the 9th and 10th Victoria, C. 93, sec. 1 (1849), known as Lord Campbell's act. This statute provides that whosoever the death of the person shall be caused by a wrongful act, neglect or default and the act, neglect or default, is such as would if death had not ensued have entitled the party injured to maintain an action and recover damages, that the person who would have been liable had death not ensued shall be liable to an action for damages notwithstanding the death of the injured person, and that every such action shall be for the benefit of the wife, husband, parent or child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased.

The substance of this statute was enacted by congress February 17, 1885, at the second session of the forty-eighth congress and applies to the District of Columbia. This is drawn in the same language nearly as the British statute, except that it limits the amount of recovery to ten thousand dollars, and provides that the action shall be brought by and in the name of the personal representative of such deceased person.

The Ohio statute, sec. 6134, has a similar provision, and sec. 6135 provides that such action shall be for the benefit of the wife or husband and children, or if there be neither of them, then of the parents and next of kin of the person whose death shall be so caused, and it shall be

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brought in the name of the personal representative of the deceased, and limits the recovery to ten thousand dollars.

Similar statutes have been enacted in nearly every state of the Union, and the provision that the action shall be brought in the name of the personal representative predominates in the different states, but in some of them the statute provides that the action shall be brought in the name of the executor or administrator of the deceased person. The statutes provide that the action shall be brought in the name of the personal representative in the following states: New York, in 1880 (later changed to executor or administrator), New Jersey, Illinois, Michigan, Indiana, Wisconsin, California, Minnesota, Delaware, Kansas, Kentucky, Nebraska, Nevada, Arkansas, Pennsylvania, Tennessee, Utah, Vermont, Virginia, West Virginia. The statutes provide that it shall be brought in the name of the executor or administrator in Massachusetts, Arkansas, Connecticut, North Carolina, South Carolina, and in Rhode Island by executor or administrator, or if there is a widow and no children, by her and in her own name; in Texas the action shall be brought by the parties entitled to the benefit of the action, and if they fail to bring suit in three months after the death of the deceased, then by the executor or administrator unless notified by the parties entitled thereto not to prosecute. The action shall be brought in Iowa by the legal representatives of the deceased; in Maryland, in the name of the state for the benefit of the next of kin; in Missouri, by the real party in interest.

Bouvier's Law Dictionary defines personal representatives as "The executors or administrators of the persons deceased."

Lawson's Rights and Remedies and Practice, Vol. 3, sec. 1018: "Lord Campbell's act gives the action to the executor or administrator of the person killed, and so do the statutes of many of the states. Where the action is given to the personal representatives this means the executor or administrator and not the next of kin;" and cites numerous decisions.

It has frequently been decided in this state that "the action being the creature of the statute must be governed by the statute," *Wolt v. Railway Co.*, 55 Ohio St., 517, 527, and that terms shall be construed in their ordinary acceptation and significance consistent with common sense. *Allen v. Little*, 5 Ohio, 65; *State v. Peck*, 25 O. S., 26; *Norris v. State*, 25 O. S., 217.

Werner on American Law of Administration, page 906, says: "The term personal representatives applies strictly to executors and administrators."

Thompson on Negligence, Vol. 2, page 1276, sec. 77, says: "Lord Campbell's act provides that the action shall be brought in the name of the executor or administrator. It will be seen by referring to the statutes that many of the states have changed this wording in enacting laws

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similar to the British act so as to provide that 'every such action shall be brought by and in the name of the personal representatives of such deceased person. This has given rise to the question, who are the personal representatives' which has been answered by construing the words to mean the executor or administrator and not the next of kin."

Judge Dillon, in *Hagen v. Kean*, third Dillon's C. C., 125, says, commenting on the Illinois statute, which is similar to the Ohio statute: "The right of action in a case of this kind is created by statute and it must be brought by and in the name of the person whom the statute prescribes shall bring it, that is, the personal representative of the deceased, and these words in the statute of Illinois have been authoritatively construed by the Supreme Court of that state to mean 'the executor or administrator.' "

In *City of Chicago v. Major*, 18 Ills., 357, the court, commenting on the statute which provides that the action shall be brought in the name of the personal representative, say: "The action under this statute is to be brought by the personal representatives, that is, by the executors or administrators;" and the syllabus, second clause, says: "The action under this statute is to be brought by the executor or administrator of the deceased."

Kramer v. Railroad Co., 25 Cal., 436, Chief Justice Sanderson for the full court, commenting upon this statute, says: "The words personal representatives as used in this act mean the administrator or executor of the deceased."

Hartigan v. Southern Pacific Co., 86 Cal., 142, is a case in which suit was brought by the executor of the last will of the deceased under the California statute, which has the same provision as the Ohio statute, that the suit may be brought in the name of the personal representatives. In this action the executor, with the approval of the court, compromised the case. A suit was afterwards brought in the name of the heirs. The court held that the executor, as the personal representative, is the proper person, or had the legal right to bring the suit, and that the compromise was valid, and the plea in abatement to the action of the heirs was sustained."

In 18 Am. and Eng. Ency. Law, page 407: "The words personal representative must in the absence of other controlling words be taken to mean person claiming as executor or administrator."

The Supreme Court of Wisconsin, in *Whiton v. Railroad Co.*, 21 Wis., 305: The statute providing that such action shall be brought in the name of the personal representative of the deceased, the court say that such action must be brought by the executor or administrator.

Boutilier v. Steamboat "Milwaukee," 8 Minn., 73, in a long opinion covering the point raised by this demurrer, says, commenting upon a statute and provision similar to our own, that the action shall be brought in the name of an administrator or executor.

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In 68 Mich., 135, the deceased left a will and named an executor. The widow requested the executor to commence suit under a similar statute and he declined. After the executor was discharged, the widow was appointed administratrix. It was claimed that the probate court had no jurisdiction to make such appointment and therefore the administratrix had no power to commence such action. The court, Judge Champlin rendering the decision, says: "The liability created by the statute in cases of this kind is a chose in action which is assets belonging to the personal representative and if the executor named in the will refuses to prosecute or reduce the assets to a chose in possession or the purpose of distribution, under the statute another person may be appointed to complete the administration."

In Re Windom's Trust L. R., 1 Equity Cases, 290: "Personal representative means executor or administrator."

"The words personal representative are to be understood in the ordinary sense of executors and administrators unless controlled by the context to the will." Siberton v. Skeels, 5 Eng. Chan. Rep., 587.

Used in the ordinary sense to arrive at a proper understanding of this statute, the same rule would apply and the words personal representative as used in the Ohio statute evidently means executor or administrator.

Therefore the demurrer will be overruled.

STAY OF EXECUTION.

[Superior Court of Cincinnati, Special Term, 1900]

WILLIAM P. LEEDS V. JOHN B. PEASLEE ET AL.

1. STAY OF EXECUTION—CLERK DOES NOT PASS UPON BOND.

A bond for stay of execution is the property of the defendant in error, and it is his right and duty to examine it to see if it is sufficient under the statute to stay the execution. A clerk of the court is under no duty to either prepare or pass upon the legal effect of the bond; and hence is not liable for damages should the bond prove insufficient to stay the execution.

2. REMEDY OF CLERK DECLINES TO ISSUE EXECUTION.

If the clerk of the court, under a misapprehension of the effect of a bond tendered and accepted, declines to issue an execution, or recalls one issued, the judgment creditor has his remedy, not only in his own right, to appeal to the court, but also under the concluding provisions of sec. 4965. Rev. Stat., providing that the clerk "in the performance of his duties * * * shall be under the direction of his court."

Burch & Johnson, for plaintiff.

Gideon C. Wilson, contra.

DEMPSEY, J.

This is an action brought by the plaintiff on the official bond of John B. Peaslee, as clerk of the common pleas court of Hamilton county, to recover damages alleged to have been sustained by plaintiff,

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who was a party to an action in one of our courts to the judgment in which error was prosecuted, and wherein the said Peaslee is alleged to have taken a bond in stay of execution which was conditioned under subdivision 1 of sec. 6718, Rev. Stat., when it ought to have been conditioned under subdivision 3. The petition, after averring facts setting forth at large the above particulars, then alleges that said Peaslee, as such clerk, approved the bond as taken as sufficient in form and law under the order of the court under which it was given, and duly filed the same, and entered upon the appearance docket of the court the following: "May 31. Minute 1408: Entry staying execution. Bond, \$1,500; bond 1709, book 7, in \$1,500 filed." It further alleges that plaintiff had no knowledge but what Peaslee had taken the bond as ordered by the court, nor but what he had acted in all respects in accordance with law and the order of the court, and believed he had so acted and taken the proper bond as ordered, and consequently did not issue an order of sale or execution upon the judgment by reason of such belief; and then goes on to aver the damage. The petition was met by a general demurrer.

The condition of the official bond of Mr. Peaslee, which forms the gist of this action, is that one which provides that he "shall faithfully and impartially discharge and perform all and singular the duties of his said office." Now, what were Mr. Peaslee's duties, as clerk, with regard to bonds given by way of supersedeas? Section 4965, Rev. Stat., provides that "the clerk of each of the courts shall exercise the powers conferred and perform the duties enjoined upon him by statute and by the common law; and in the performance of his duties, he shall be under the direction of his court."

By the common law there was no duty enjoined or power conferred upon the clerk with regard to supersedeas bonds, because at common law no such bond was required, the writ of error, if obtained and allowed before execution, suspending the execution till the error proceeding was determined. Stephen on Pleading, 142. To remedy evils arising from this method of procedure, it was provided by various statutes that, to stay the execution, bail in error should be given. Stephen on Pleading, 142, note L. This requisite was prescribed in Ohio from the beginning of the state, so that, in this respect, we must look to the provisions of our statutes to ascertain what the duties of the clerk are. What the nature of these duties are is to be found in secs. 6718 and 6719, Rev. Stat.

Section 6718 provides that "no proceeding to reverse, vacate or modify a judgment or final order * * * shall operate to stay execution, unless the clerk * * * take a written undertaking, to be executed on the part of the plaintiff in error to the adverse party, with sufficient surety, as follows;" and then follow various forms of condi-

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tions depending upon the character of the judgment sought to be reviewed.

Section 6719 provides that "before the written undertaking mentioned in section 6718 shall operate to stay execution, * * * the execution of the undertaking and the sufficiency of the sureties must be approved by the court in which the judgment was rendered or order made, or by the clerk thereof; and the clerk shall indorse such approval, signed by himself, upon the undertaking, and file the same in his office for the defendant in error."

By section 6718, the only duty imposed upon the clerk, and that is done indirectly, is that he take, or, as used in the former statutes, shall take, that is, receive, accept, when tendered to him, in any particular case, a bond, executed as prescribed, and with the conditions appropriate to the judgment on which execution is sought to be stayed. In other words, when such a bond is tendered to him, it is compulsory upon him to accept it. There is nothing in the language of the statute which compels him to prepare the bond with its conditions, nor, even when prepared between the parties, to pass upon its construction.

Now, suppose he does take a bond with wrong conditions for that particular case. No harm can be done to the defendant in error. The clerk has nothing to do with causing an execution either to issue or to be stayed. The initiative in neither case is to be taken by him. It is the judgment creditor, by his preceipe, who causes an execution to issue, for the clerk is not bound to issue without preceipe, and it is the judgment debtor, by his bond, who stays the execution. The preceipe in one case starts the machinery in motion; the bond, on the other hand, stops the machinery. Once a proper bond is given, the hand of the clerk is stayed from issuing, or that of the sheriff from proceeding with, the execution. If the proper bond be not given, then the rights of the judgment creditor to have his execution issued or enforced are not interfered with. If the clerk, under a misapprehension of the effect of a bond tendered and accepted, decline to issue an execution, or recall one issued, the judgment creditor has his remedy, not only in his own right, to appeal to the court, but also under the concluding provisions of sec. 4965, which destroy any presumption that the clerk is to be the judge of what his duties are and how they are to be performed, for the provision is that "in the performance of his duties he shall be under the direction of his court."

The provisions of sec. 6719 do not alter or change the construction of sec. 6719 in any particular. Section 6718 prescribes the nature and kind of a bond the clerk must take; section 6719 prescribes his duties as to the formalities, that is, that he shall see that such acts are done and forms observed as are required by law to make it the bond or deed of the party.

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The present statute preserves the wording of the former statutes when a great many formalities were necessary to bonds, such as sealing, witnessing, etc. In addition, he must approve the financial ability of the sureties to respond to the penalty of the bond.

But the petition, to eke out the cause of action, makes the averments, quoted above, of the entry in the appearance docket, and the plaintiff's reliance upon his own belief that Mr. Peaslee had done his duty as to the bond, and consequently that no order of sale or execution was issued until the termination of the error case. The answer to this is, that the plaintiff had, in law, no right to rely upon the effect of the entry upon the appearance docket, nor of the belief it created in his mind; it was neither the order of the court, for that under subdivision 3 only fixes the amount of the bond, nor the entry on the appearance docket, for that at the most could only be evidence that a bond was given that stayed the execution, the bond itself, if properly conditioned, and executed, and with approved surety. The bond, under the statute, is filed for the defendant in error; it was his property, although the clerk was the custodian, and it was the defendant in error's right and duty to examine the bond to see if it was sufficient under the statute to stay the execution. It was as much a part of the case as any other paper in it. If plaintiff had examined the bond, he could have had it rectified or insisted upon his process. Not having examined it, and the clerk being under no duty to either prepare it or pass upon its legal effect when prepared, I fail to see how plaintiff can say that he rightfully relied upon it, or upon the entry on the appearance docket, or upon the belief they inspired in him as to Mr. Peaslee's action.

In my judgment the demurrer ought to be sustained, and it will be so ordered.

PRINCIPAL AND AGENT.

[Superior Court of Cincinnati, General Term, 1900.]

FRED HASSELMAYER v. AVONDALE LOAN AND BUILDING CO.

UNAUTHORIZED PAYMENTS TO DIRECTOR OF BUILDING ASSOCIATION.

A director of a building association who receives deposits from members who are employees under him, without authority directly or indirectly from the company, acts as agent of the members and not as agent of the association.

C. W. Baker, for plaintiff in error.

J. D. DeWitt, for defendant in error.

JACKSON, J.

These (above entitled and *Hiatt Edwards v. Same*) were actions in which the plaintiffs sought to recover from defendant on account of deposits which it was alleged defendant had received from plaintiffs from time to time. At the trial below the evidence showed that all weekly

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payments were made to one Patrick Fahey, who was overseer of the car barns of the Cincinnati Street Railway Company, the plaintiffs being employes of said company, and under the immediate control of said Fahey. The money so received by Fahey was never paid over to the defendant. Fahey was a director of the defendant company, but he was not the secretary or treasurer thereof, nor was he directly or indirectly authorized to accept and receipt for money in behalf of the company.

At the trial the court below instructed the jury to return verdicts for the defendant on the ground that the evidence showed that Fahey was acting solely as the agent for plaintiffs, and not as agent for the defendant. In this we see no error. The question at issue has been directly decided in *Sachs v. Duckworth Building & Loan Association*, 6 Dec., 254.

The judgment of the court below will, therefore, be affirmed.

PARTITION.

[Hamilton Common Pleas, 1900.]

CATHERINE SCHNEIDER ET AL. v. EDNA CORDESMAN, A MINOR, ETC.

RULE AS TO PARTITION WITHIN A YEAR—APPLIES TO DECREE.

The limitation of sec. 5756, Rev. Stat., providing that a partition of real estate shall not be ordered by the court within one year from the date of death, unless the petition sets forth and it be proved that all debts and claims against decedent have been paid, or secured to be paid, refers to the time of entering the decree, and not to the time of filing the petition. Therefore, upon application for partition within the time limit, and without compliance with the statute, the court may overrule a motion to dismiss the petition and grant an order overruling the motion for plaintiff in partition for judgment until the statutory period has elapsed, unless the latter prove, and the burden is his, that all debts and claims have been paid or secured to be paid.

SUIT FOR PARTITION.

SPIEGEL, J.

The plaintiff, Catherine Schneider, moves the court for judgment and an order for partition of real estate, devised to her and others by the last will and testament of Magdalena Klein, who died in May, 1900, leaving, according to the allegations of the petition, no debts except such as have been paid, and one other debt, secured by mortgage upon the real estate sought to be partitioned, and leaving sufficient personal property to pay the costs of administration. To this the administrator of Magdalena Klein responds with a motion to have the petition for partition struck from the files, because one year has not elapsed since the death of the devisor.

The authorities in our state are united in the proposition that sec. 5756, Rev. Stat., must be strictly construed, which section provides that a partition of real estate shall not be ordered by the court within

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one year from the date of the death of an inhabitant of this state, unless the petition shall set forth, and it be proved that all of the debts and claims against the estate of such decedent have been paid or secured to be paid. But the authorities differ whether this section prohibits the filing of a petition in partition during said year, or whether it prohibits the court from granting an order for partition.

In an elaborate opinion, Judge Hunt, of our Superior Court, in *Smith v. Montag*, 1 Dec. 224, holds the former view, and is confirmed in this position by the opinion of the third circuit court, delivered by Judge Seney, in *Swihart v. Swihart*, 4 Circ. Dec., 624. Both these cases are reviewed by the fifth circuit court, Judge Jenner delivering the opinion, in *Fryman v. Fryman*, 6 Circ. Dec., 877, which holds as the result of its investigation that the meaning of the statute is clearly that "*a partition shall not be ordered by the court within one year* from the date of the death of such inhabitant," unless the petition sets forth certain facts and proof of the facts be made on the hearing. It is not the time of filing the petition that is limited, but the time when partition may be ordered. The petition may be filed at any time, but the decree can not be entered until the expiration of the year. There can be no complication, no transfer of title, until the decree is entered. The filing of the petition in no way interferes with the rights of the creditors.

If we but read the section in the light of the rule of strict construction applicable to this proviso, the intention of the legislature could not have been more clearly expressed if to the amendment had been added the words, "but the time of filing the petition is not intended to be limited."

This is the latest decision in Ohio upon this question, and I am inclined to believe the most reasonable view to be taken of sec. 5756, Rev. Stat., especially as our Supreme Court in *Lafferty v. Shinn*, 38 Ohio St., 46, has determined the only other factor remaining, namely, the right of the administrator by answer and cross-petition in a suit for partition to obtain his order of sale of the realty for the payment of debts instead of a judgment for partition.

In accordance with this view, therefore, the motion of the administrator to dismiss the petition is overruled, but he may take an order, overruling the motion of the plaintiff for judgment and order for partition until the statutory period has elapsed, unless the latter will prove, and the burden is his, that all of the debts and claims against the estate of Magdalena Klein have been paid, or, if any exist, will secure the same to be paid.

CONSTITUTIONAL LAW—WITNESSES—CONTEMPT.

[Cuyahoga Common Pleas, October 23, 1900.]

D. B. STEUER v. THEODORE F. McCONNELL, SHERIFF.

1. RESOLUTION VALID IN PART AND INVALID IN PART.

Under the rule that a law may be valid in part and invalid in part, if such parts may be separated, a resolution of a city council directing a committee to investigate charges of corruption in awarding a certain contract is valid to the extent of directing the investigation, although, as an authorization for the expenditure of money, it may be invalid without the prerequisites required by law for such resolutions.

2. SECTION 1687, REV. STAT., NOT REPEALED BY SEC. 1545-11, REV. STAT.

While sec. 1545-11, Rev. Stat., known as the federal plan law of Cleveland, which authorizes the council, or any committee thereof, to compel the attendance of witnesses, and provides that no witness shall be excused from testifying, but that the testimony shall not be used in criminal prosecution, except for perjury, gives no power to a committee of the council, to commit for contempt, it does not in terms, or by implication, repeal or prevent the operation, as conflicting or inconsistent, of sec. 1687, Rev. Stat., which provides that in all cases in which attendance of witnesses may be compelled, etc., the council or a committee thereof, shall have the power to compel the giving of testimony conferred upon courts of justice.

3. LEGISLATURE HAS POWER TO AUTHORIZE COUNCIL TO COMMIT.

The legislature of Ohio has constitutional power to vest a city council, or a committee thereof, with authority to commit to jail a witness who may refuse, except under the privilege as to incriminating testimony, to answer pertinent questions put in the course of an investigation which is confined within the proper limits of its lawful functions; and so far as an investigation is confined to finding out whether or not corrupt methods have been used, or attempted to be used, in procuring a public contract, it is legitimate.

4. CONSTITUTIONAL QUESTION CANNOT BE RAISED BY WITNESS.

The question of the constitutionality of a statute requiring witnesses to appear and answer questions, cannot be raised by one who is not a formal party to a case, criminal in its nature, when it appears that, in his own opinion, the answer would not tend to criminate him.

Messrs. Dawley ; Foran ; Collister and Heisley, for petitioner.

Hogsett, Beacom, Ecell and Gage ; and Blandin, for defendant.

WING, J.

It is claimed that the resolution of September 10, which purports to authorize the committee named, to hold the investigation in the course of which the commitment, the legality of which is under consideration, was made, is invalid because it involves the expenditure of money, and also because some of the prerequisites to such legislation as are required by sec. 1545-3, Rev. Stat., were omitted.

The resolution may be invalid as an authorization for the expenditure of money, but is not necessarily invalid as an authority to investigate.

The investigation contemplated by the resolution might be had without expense.

A law may be valid in part, although invalid in other parts if such parts may be separated.

Cuyahoga Common Pleas.

The court, therefore, holds the resolution so far as it authorizes investigation, to be valid notwithstanding the objection made.

It is further urged for the petitioner that sec. 1545-11, Rev. Stat., gives, by its terms, no power to a committee of the council to commit for contempt, and, that sec. 1687, Rev. Stat., is not operative in the city of Cleveland because repealed by the act of March 16, 1891, commonly called the federal plan act.

The repealing clause of the last mentioned act provides that only such statutes of the state which conflict with any provisions of the act, are thereby repealed: and further provides that the latter act shall be held to supersede such statutes only as to matters of inconsistency. The language of this repealing section, 85, gives character to the whole act. From it, we may gather that the intention of the legislature was to pass an act for the government of cities of the grade and class mentioned, which should be more *efficient*, as its title states, without repealing existing laws, applicable thereto, which would not prevent the operation of the provisions of the new act.

Section 11, does not, in terms, prevent the operation of sec. 1687, and, hence, does not conflict and is not inconsistent with it. If, by the latter act, a different way of punishing contumacious witnesses was provided for the city of Cleveland than existed in other parts of the state, its constitutionality might be open to grave question. In *State ex rel. Crawford v. McGregor*, 44 Ohio St., 628, in which there was evident conflict between the earlier and the latter statute, the opinion of the court on page 632 suggests this last consideration:

"And when, as in this case, the special provisions of one section, operating as an exception to the more general provisions of another, are uniform in operation throughout the state, they are not in conflict, with the constitutional provision requiring all laws of a general nature to have such operation."

In *Dillon on Municipal Corp.*, sec. 88, it is said: "The presumption is not lightly to be indulged that the legislature has, by implication, repealed, as respects a particular municipality or as respects all municipalities, laws of a general nature elsewhere enforced throughout the state. Yet a statute or special act, passed subsequent to the general law and *plainly irreconcilable* with it, will, to the extent of the conflict, operate as a repeal of the latter by implication."

The court holds that sec. 1687, Rev. Stat., *has* operation in the city of Cleveland notwithstanding the passage of the federal plan act so-called.

The case before the court may be briefly stated as follows:

By resolution of the council of the city of Cleveland, a committee from its number was directed to investigate charges, made by various persons, of corruption in connection with the awarding of a contract. The language of the resolution in that regard is, "to investigate the

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truth concerning the charge made by various persons to the effect that corrupt methods have been resorted to for the purpose of securing contracts from the city of Cleveland with the Gamewell Fire Alarm and Telegraph Company."

The committee, in the discharge of the duty thus imposed, called, among other witnessess, its presiding officer, D. B. Steuer, the petitioner. Many questions were put to him, the relevancy of which the court cannot appreciate. The record shows that the following question was put: "Were you in the city clerk's office in said city on the afternoon of the twenty-first day of August last?" The witness refused to answer. He did not state his reasons other than that he refused under advice of his counsel. He stated affirmatively, "I will say that I am eager to answer, but I am in the hands of my attorney and will act under his advice. I have come here to testify and am eager to testify, but I am acting under the advice of my attorney." The question was put to him, "Do you refuse to answer the question because it will tend to criminate you?" Thereupon, Mr. Dawley, counsel for witness, said, "You need not answer that. His answer would not criminate him. We rely solely upon the proposition that this committee has no power to subpoena here before the committee anybody against whom they say charges are pending or likely to be pending, who stands in the light of the defendant, and compel him to give evidence in this matter."

The witness, persisting in his refusal to answer, was committed to jail until he should purge himself of contempt by making answer.

From these facts which are undisputed, I gather:

First—That the council, in appointing and authorizing the committee, was in the performance of one of its highest functions, to-wit, making investigation to find out whether it needed cleansing from corrupt influences.

Second—That the witness, not only omitted to invoke any privilege, but decided he did not need the protection of the privilege.

In Warner v. Lucas, 10 Ohio, 387, it is held, that the witness is his own judge as to whether an answer will, either directly or indirectly, criminate him.

By the decision in Councilman v. Hitchcock, 142 U. S., 547, either sec. 1687, Rev. Stat., or sec. 1545-11, would be held unconstitutional if invoked as the authority for compelling an unwilling witness to give an answer which he deemed to have a tendency to incriminate him, for the reason that such sections do not provide complete immunity for those who are compelled to make disclosure.

This question of unconstitutionality cannot be raised by one who is not a formal party to a case, criminal in its nature, when it appears that, in his own opinion, the answer would not tend to criminate him.

Both sections referred to are constitutional in so far as they do not invade the right of an individual, guaranteed to him by sec. 10 of the bill of rights of Ohio.

There is full legislative power to compel answer from witnesses generally, subject to this exception:

"The extent to which the witness is compelled to answer such questions as do not fix upon him a criminal culpability, is within the control of the legislature." State v. Newell, 58 N. H., 314. This case is quoted with approval, in Brown v. Walker, 161 U. S., 591. In the last case referred to, on page 597, it is said:

"Thus if the witness himself elects to waive his privilege, as he may doubtless do, since the privilege is for his protection, and not for that of other parties, * * *." This is supported by many cited authorities.

In Emery's case, 107 Mass., relied upon by counsel for petitioner, in the conclusion of the opinion on page 186, it is said:

"The result is that in appealing to his privilege as an exemption from his obligation to answer the inquiries put to him, the petitioner was in the exercise of his constitutional right; and his refusal to answer on that ground" could not be regarded as contempt.

In U. S. v. James, 60 Fed. Rep., 257, in which Judge Grosscup delivers one of the most ably written opinions I have ever read, it is held, that the fifth amendment to the federal constitution secures a *privilege*. The recusant witness in that case avowed his reason for not answering, that the answer would tend to criminate him.

The general law is, that all witnesses must answer all questions authoritatively asked, which are pertinent to the objects of an examination.

The common-law rule, made more permanent by the fifth amendment to the constitution and section 10 of the bill of rights of Ohio and other provisions of similar character in the organic law of the several states, furnishes an exception to this general rule. The exception is in the nature of an exemption to the witness under certain circumstances. It is for his own benefit only, and relieves him from doing what otherwise would be his duty to do.

All of the authorities appear to treat the right of the witness as a privilege to be used or waived by him as he may choose. When the witness himself declares that he is eager to testify, there is no duty resting upon any tribunal to prevent him from so doing. Authority for this view may be found in State v. Allen, 107 N. C., 805; Crause v. Sentinel Co., 62 Wis., 660; San Antonio Ry. Co. v. Muth, 7 Tex. Civ. APP. 448; Lothrop v. Roberts, 16 Calif., 250.

The court holds that the legislature of Ohio has constitutional power to vest the city council, or a committee thereof, with authority to commit a witness who may refuse to answer pertinent questions put in

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the course of an investigation which is confined within the proper limits of its lawful functions.

So far as the investigation referred to in this opinion is confined to finding out whether or not corrupt methods have been used or attempted to be used in the procuring of the Gamewell contract so-called, it is legitimate.

I feel bound to express to counsel in this cause my high appreciation of the most able manner in which they have assisted the court by argument and citation.

The writ is denied, and the petitioner is remanded.

CONSTITUTIONAL LAW.

[Cuyahoga Common Pleas, November 30, 1900.]

STATE EX REL. V. W. E. CRAIG, AUDITOR, ET AL.

1. SECTION 2966-3, REV. STAT., NOT UNCONSTITUTIONAL FROM ITS OPERATION.

Section 2966-3, Rev. Stat., providing for the appointment, qualification, etc., of deputy state supervisors, is not unconstitutional from a lack of uniformity in eliminating from its operation cities governed by other statutes. Under the authority of State ex rel. v. Buckley, 60 Ohio St., 273, when a statute upon a subject of a general nature is made to extend to the whole state in one part thereof, and in another part an attempt is made to limit its operation to territory less than the state, the limitation may be disregarded; and such construction should be given, when reasonable, as will uphold the statute rather than one which would defeat it.

2. DEPUTY SUPERVISORS OF ELECTIONS NOT OFFICERS—MAY BE APPOINTED.

Deputy state supervisors of elections, being responsible to the secretary of state as principal election officer, do not act in an independent capacity and for this reason lack the distinguishing characteristics of public officers. They are not officers, within the legal definition of that term, and, though their jurisdiction may be coterminous with that of the county, they are not county officers or within sec. 1, art. 10, of the constitution, providing that the general assembly shall provide by law for the election of such township and county officers as may be necessary. Section 2966-3, Rev. Stat., is not, therefore, unconstitutional for the reason that it provides for appointment instead of election of deputy state supervisors of elections.

Samuel Doerfler, for relator.

P. H. Kaiser and F. L. Taft, for defendants.

FORD, J.

This is a case brought by a taxpayer to restrain the auditor from issuing the necessary warrant for the payment of the deputy state supervisors appointed under sec. 2966-3, Rev. Stat., upon the grounds, (1) that the statute is unconstitutional, because it violates sec. 26, art. 2 of the constitution, which provides that all laws of a general nature shall have a uniform operation throughout the state; and, (2) because it violates sec. 1, art. 10, of the constitution, which provides that the general assembly shall provide by law for the election of such township and county officers as may be necessary. A general demurrer was interposed by the defendants.

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The plaintiff contends that sec. 2966-3, Rev. Stat., is in violation of the constitution because the statute, while dealing with the subject of elections which is of a general nature, does not have a uniform operation throughout the state, for the reason that cities, being governed as to elections by other statutes are eliminated from the operation of this statute.

This point seems to have been fairly raised and definitely settled in *State ex rel. v. Buckley*, 60 Ohio St., 273, 276. There was involved in that decision the construction of sec. 2966-3, Rev. Stat., as passed April 16, 1896. That act was declared unconstitutional because it excepted the city of Mansfield from its operation. Section 2926b, passed at an earlier date, was declared revived, which operates uniformly to all cities of a given classification.

In that case the court say: "There is a difference between an exception and a limitation. When a statute upon a subject of a general nature is made to extend to the whole state in one part thereof, and then in another part an attempt is made to limit its operation to territory less than the state, the limitation may be disregarded; because to give it effect would render the whole statute unconstitutional; and such construction should be given when reasonable as will uphold the statute rather than one which would defeat it. *Burt v. Rattle*, 31 Ohio St., 116.

"As this section, 2926b, as passed April 16, 1896, is unconstitutional and inoperative, the repealing section of the act is also inoperative.
* * *

"This leaves section 2926b, of the act of April 28, 1890, 87 O. L. 359, in full force. It is urged that that section is also unconstitutional, for the reason that in one sense it operates only in cities, and not in those parts of the state lying outside of such cities. As is shown in *State v. Nelson*, 52 Ohio St., 88, the act operates, in theory at least, all over the state, because wherever a city may be built up, there the act will be found to be in full force and applicable to such city.

"The validity of the section can only be maintained on the doctrine of the classification of cities, and there are some difficulties in the way of so maintaining it. But, in view of the condition of the election statutes, and the necessity of more stringent means to prevent fraud, and secure fair elections in cities, and the fact that for more than forty years elections in cities have been conducted differently from those in rural districts, the one employing members of the council, and the other township trustees, we are constrained to hold the act of 1890, with its classification applicable to cities, as a valid enactment.

"But while such classification when applied to cities may be thus upheld, there is no authority for the classification of counties as to elections. As to subjects of a general nature, laws must have uniform operation, and they cannot be made to operate in some counties and be excluded from others. * * *"

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"It therefore follows that the holding of the circuit court was right, and that while the city boards of election may exercise their powers and perform their duties within the city limits, they have no jurisdiction in the territory outside of the city; and that it is the duty of the state supervisor of elections to appoint deputy state supervisors under the statute, for such territory in each county of the state containing a city, to conduct all elections under the laws applicable to such deputy state supervisors."

This holding of the Supreme Court, we think disposes of the first branch of the case.

The principal contention, however, is made upon the other ground, namely, that the statute violates section 1, art. 10 of the constitution, which reads:

"The general assembly shall provide, by law, for the election of such county and township officers as may be necessary."

In support of this proposition, the plaintiff cites State ex rel. Armstrong v. Halliday, Auditor, 61 Ohio St., 171. This was a suit in mandamus to compel the auditor of Franklin county to draw his warrant on the treasurer of the county for the payment of certain fees claimed to be due him as justice of the peace, made in a prosecution instituted before him by the fish and game warden of the county against one Jacobs, for a violation of sec. 6968, Rev. Stat., publishing certain offenses against the fish and game laws of the state. The statute construed in that case reads as follows:

"The commissioners shall, at their annual meeting in January, or at any other time, appoint a fish and game warden in each county in the state, who shall hold his office for two years, unless sooner removed, and they shall also appoint a special warden for Lake Erie, and for Mercer county, Lewiston, Licking, Laramie and Sippo reservoirs of the state; each warden shall, before entering upon the discharge of his duties, give a bond to the state, with sureties to the satisfaction of the commissioners in the sum of two hundred dollars, conditioned for the faithful performance of the duties of his office, which bond shall be deposited with the commissioners; and it shall be the duty of the warden, under the general direction of the commissioners, to appoint such assistants as they may require to assist them in policing the territory, both land and water, of their respective counties and territories, arresting wherever found in the state all violators of the laws of the state enacted for the protection of fish and game."

The court in that case say: "The distinguishing characteristic of a public office is, that the incumbent, in an independent capacity, is clothed with some part of the sovereignty of the state, to be exercised in the interest of the public as required by law. The office must be of a continuous character as opposed to a temporary employment, though the time be divided into terms to be filled by election or appointment in

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accordance with the genius of our system of government; and a bond and an oath of office are generally, though not always, required for the faithful performance of the duties of the incumbent; and compensation is made either by salary or fees or both.

"Here then are all the distinguishing characteristics of a public officer as usually defined and understood: A warden, denominated a 'County Warden,' is to be appointed in each county of the state; the appointment is not for a temporary purpose, the office is made continuous, though the appointment of an individual to fill it, is for a term, one, as just seen, of the usual characteristics of an office; a bond is required for the faithful performance of the duties, and these duties are of a public character—the enforcement of the laws of the state in their 'respective counties,' made for the preservation of fish and game. Moreover, by other sections of the Revised Statutes (6966-2 and 6968) a county warden acts as a constable or sheriff in prosecutions instituted by him; makes arrests, subpoenas witnesses and jurors, and has charge of the jury in its retirement; and on conviction, conducts the defendant to the jail of the county. The commissioners of the county are required to allow him a salary, not exceeding three hundred dollars annually; and, is also entitled to certain fees, such as is allowed sheriffs and constables for similar services. These wardens are not only appointed for their respective counties, but their duties are limited to 'policing the territory' thereof. Hence their duties being of a public nature and limited to their counties, they are, in every sense, as much county officers within the sphere of their duties, as are county sheriffs; and are, therefore, elective and not appointive officers."

It is claimed by the plaintiff in the case at bar, that the state deputy supervisors possess many, or the most, of the characteristics of a public officer as indicated in the game warden case; namely, that they are officers in an independent capacity, clothed with some part of the sovereignty of the state, appointed for definite terms, taking oath of office, are required to give bond, and are paid a compensation out of the county treasury, and that the territory in which they act, being coterminous with the county, they are, therefore, county officers and being county officers, should be elected and not appointed.

In the game warden case the decision appears to have turned upon the definition of an officer, and upon the fact that the appointment was made for each county in the state. It is fair to presume that if the statute in that case, instead of reading "The commissioners shall * * * appoint a fish and game warden in each county in the state," had read "The commissioners shall appoint a game warden in each two counties of the state," or "in each twenty-five townships in the state," with all the other provisions of the statute as to term of office, and duties, with the provision that the salaries should be paid one-half from the county treasury of each county or in proportion to the number of

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townships in the designated territory, the Supreme Court would have arrived at a different decision.

This is particularly true in view of the fact that the administration of the game laws seems to be especially in the control of the game commissioners who are plainly state officers and, if, instead of being designated "Game Wardens," they had been designated "Deputy State Game Wardens," there would be left no room to claim that such officers could, by any strain of reasoning, be held to be county officers.

The act under which the deputy supervisors were appointed (Sec. 2966-1) provides as follows:

"There is hereby created the offices of state supervisor of elections, and of deputy state supervisors of elections, with the powers and duties hereinafter prescribed."

It is plain from this language, that such officers lack many of the distinguishing characteristics of public officers as indicated in the game warden case. They do not act in an independent capacity. They are deputy state supervisors, which implies that they are responsible to some principal, which shears them of the characteristics of independence.

From an examination of the election laws in this state, it seems apparent the legislature intended that the conduct of elections should belong to the state and be under the control of state officers.

Section 2966-2 provides that, "By virtue of his office the secretary of state shall be the state supervisor of elections, and in addition to the duties now imposed on him by law, shall perform the duties of such office as defined herein."

We have, then, the secretary of state as the principal election officer, and the deputy state supervisors as subordinate officers for carrying out the agencies of the state for the conduct of elections.

The case of *Warwick v. State*, 25 Ohio St., 21, throws some light upon the subject of what is an officer and what is a deputy officer. In that case, Warwick was indicted for perjury, and convicted. The record showed that the perjury was assigned upon an affidavit by Warwick upon his application to the probate court for a marriage license. The record shows that the oath was administered to him by a woman, Ellen Stranahan, then acting as deputy clerk of said probate court, and who had been theretofore duly and legally appointed and qualified as such deputy clerk, provided a woman is capable of holding that office.

In the opinion in that case sec. 533, Rev. Stat., was under discussion, and that statute reads:

"Each judge shall have the care and custody of all files, papers, books, and records belonging to the probate office, and is authorized and empowered to perform the duties of clerk of his own court; and each probate judge may appoint a deputy clerk or clerks, each of whom shall, before entering upon the duties of his appointment, take an oath of office, and when so qualified, such deputy may perform any and all

the duties appertaining to the office of clerk of the court; and each deputy clerk is authorized to administer oaths in all cases in which it is necessary, in the discharge of his duties as such deputy clerk. Each probate judge may take such security from his deputy as he deems necessary to secure the faithful performance of the duties of his appointment."

In the case the court say, in the opinion: "In the absence of a deputy clerk, the probate judge is his own clerk, and responsible for acts done or omitted as such clerk, on the same principles applicable to other ministerial officers. The provision of law authorizing him to appoint a deputy clerk plainly implies that he is his own clerk—that he is both court and clerk; for there can be no deputy where there is no principal. If this be a correct view of the law—and we do not see how it can well be doubted—then it follows that the deputy clerk of the probate court is authorized to administer oaths such as the one in question; the statute authorizing his appointment (S & C. 1214, sec. 10) provides, that 'said deputy may do and perform any and all the duties appertaining to the office of clerk of said court, * * * and administer oaths in all cases in which it is necessary, in the discharge of his duties as such deputy clerk.'

"The question whether Ellen Stranahan was a legal deputy clerk, depends on the construction to be given to section 4 of article 15 of the state constitution. This section declares that 'no person shall be elected or appointed to any office in this state unless he possess the qualifications of an elector.' Ellen Stranahan had not the qualifications of an elector, and if this was an 'office,' within the meaning of that section of the constitution, then she was not legally appointed. No one will contend that the word 'office' in this section of the constitution is to have its broadest meaning, so as to make it applicable to everything known by that designation. Surely it does not apply to officers of private corporations, or of churches, or to all the minor and subordinate officers in colleges, academies, and schools, such as professors, teachers, janitors, and the like. Nor can it be applicable to all subordinate officers in the military or legislative departments, to the private secretary of the governor, or numerous other subordinate offices. * * * On this principle, it seems to us, the provision should be held here to apply to the principal officer alone, the probate judge, and not to his deputy. At common law the officer and his deputy fill but a single office. * * * The acts of the deputy are in law the acts of the principal, and he is responsible for them. The deputy is appointed by the principal, can be appointed by no one else, and is removable at his pleasure."

From an examination of the statute, it will be seen that the deputy clerk of the probate court possesses the most of the distinguishing characteristics of a public officer, as detailed in the game warden case; he may perform any and all of the duties appertaining to the office of the

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clerk of the court, that is, all the duties that the judge acting as his own clerk, may perform; and it is pertinent to note that when so acting, he "is clothed with some part of the sovereignty of the state;" he is required to take an oath of office; the judge may take such security as he deems fit, that is, the deputy may be required to give a bond; he is paid a compensation out of the county treasury, —and possesses other characteristics of an officer. It was held, however, in that case, that being designated and described as a deputy, he could not be regarded as an officer, for there can be no deputy where there is no principal.

So in the case at bar it is fair to conclude that the legislature in designating these officers as deputy officers, intended to make them officers subordinate to the secretary of state, the principal officer under the system of laws provided for the conduct of elections in the state.

If these conclusions are correct, the deputy state supervisors are not officers, within the legal definition of that term, and, though their jurisdiction may be coterminous with that of the county, they are not county officers, and therefore, the statute does not violate sec. 1, art. 10 of the constitution.

The petition is, therefore, dismissed.

PLEADING.

[Superior Court of Cincinnati—General Term, 1900.]

Dempsey, Jackson and Murphy, JJ.

GEORGE HARE V. HENRY BRAHM ET AL.

REVERSAL FOR PURELY TECHNICAL ERROR.

Where justice will be promoted thereby, a case will be sent back for retrial on account of an error that is purely technical. Thus, where a petition blended in one count two cases of action, one at law and one in equity, against different defendants, a judgment in favor of both defendants, on demurrer to such petition, should be reversed.

HEARD ON ERROR.

J. J. Gasser and Ed. M. Spangenberg, for plaintiff in error.

A. E. Carr and E. M. Garrison, for defendants in error.

DEMPSEY, J.

This is a petition in error filed to reverse the action of the court at special term in sustaining a demurrer to the petition below, and rendering a judgment in behalf of the defendants.

The defendants in the action were Henry Brahm, former guardian of Catherine Klosterman, a lunatic, now deceased, and A. E. Carr, as administrator of said deceased. The action was against them jointly. From the statements in the petition it appears that the plaintiff claims there was due to him on July 7, 1885, from said lunatic and her said guardian, the sum of \$275.00, for necessaries furnished to her; that said

Superior Court of Cincinnati.

Brahm, guardian, had no means of the lunatic at that time to pay said bill, and that an arrangement was entered into between them whereby the said sum of \$275.00, was borrowed from one Joseph Heman, and a joint note therefor given to him signed by "Henry Brahm, guardian," and "George Hare, trustee." This \$275.00, was turned over to plaintiff, Hare. Brahm kept the interest on this note paid up until June 7, 1888, but on February 24, 1894, plaintiff was compelled to pay to Heman the face of the note, with interest from July 7, 1888.

Catherine Klosterman, the lunatic, subsequently died, and the defendant, Carr, was appointed administrator of her estate, which was of some magnitude, and due proof was made of claim against her estate, but it was not allowed. A judgment is then prayed against both defendants, Brahm as late guardian and Carr as administrator, for said sum of \$275.00 with interest from July 7, 1888.

A general demurrer was filed to this petition by both defendants jointly, and it is to the court's action on this demurrer that error is prosecuted.

The case was argued at considerable length before us on the theory that there was in equity relief to be had against at least the estate of the deceased lunatic. But we have not found it necessary to express an opinion on this point at this time.

An inspection of the petition herein shows that two causes of action against different defendants are blended in a single count against them jointly. As against the defendant Brahm, a good cause of action was certainly stated, so far at least as his obligation to indemnify Hare against liability on the note was concerned, and this was a cause of action at law. Assuming merely, for this opinion, that there was a liability on the part of the estate in equity to respond for the necessaries furnished, there yet remains the question whether plaintiff would not be put to his election as to whom he would seek for his reimbursement. At any rate, we think there was technical error in sustaining the demurrer to the petition and entering a judgment in behalf of both defendants. As this judgment is entire, it follows that the error vitiates the whole of it, and consequently it must be reversed.

While we concede the error to be technical only, yet we conceive justice will also be promoted by sending the whole case back to the special term, where the liability of the two defendants, and the forms in which they must be pursued, and all other technicalities of procedure can be more practically and expeditiously threshed out.

Judgment reversed.

Schubert v. Taylor.

JUDGMENTS—EQUITY—INJUNCTION.

[Superior Court of Cincinnati—General Term, 1900]

Murphy, Dempsey and Smith, JJ.

JOHN SCHUBERT V. THOMAS S. TAYLOR, SHERIFF.**EQUITABLE LIENS—EXECUTION AGAINST OWNER OF FEE—INJUNCTION.**

A person holding an equitable lien on real estate cannot enjoin a sheriff from proceeding to sell the property upon a judgment and execution against the owner of the fee, the judgment creditor not being made a party to such proceeding.

HEARD ON ERROR.*James N. Ramsey and James D. Ermston*, for the sheriff.*Florence A. Sullivan and Shay & Cogan*, for plaintiff in error.**MURPHY, J.**

This is a proceeding in error to reverse a judgment of this court in special term, which judgment of the special term was to sustain a demurrer filed to the petition below.

In the petition below John Schubert, the plaintiff, averred that Catherine Schubert, who is a sister of the plaintiff in error, was the owner of certain real estate therein described; that in the year 1898, John Schubert commenced advancing money to his sister Catherine for the improvement of the said real estate, and to enable her to pay the taxes, and that the amount so advanced amounted to \$1,520.

The plaintiff further avers that at the time the first money was advanced Catherine Schubert entered into a contract with the plaintiff whereby the legal title to the said real estate was to remain in Catherine Schubert, but that she was to hold it in trust for the plaintiff for the amount advanced by him for the erection of buildings and improvements on said real estate; and it was further agreed that Catherine Schubert should in no way transfer, assign or encumber the said real estate, but that she should hold the legal title as trustee for the benefit of plaintiff "to the extent of the amount advanced by him, with interest upon the same."

Plaintiff further avers that, in violation of this agreement, Catherine Schubert, on March 19, 1900, permitted one Anna Flagg to recover a judgment against her in the court of common pleas of Hamilton county, Ohio, said action being numbered 116,677 of said court; that an execution was issued in said cause, directed to Thomas S. Taylor, sheriff, who, in obedience to the order of the court of common pleas, levied upon the real estate and improvements before mentioned, as the property of Catherine Schubert, and is now proceeding to advertise the same for sale on execution.

Plaintiff further avers that on April 3, Catherine Schubert, at his request, conveyed to him the legal title to the premises aforesaid by a deed, which deed was duly recorded, on April 3, 1900, in deed book 843, page 406, of the Hamilton county records.

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The prayer of the petition is that by an order of this court the defendant, Thomas S. Taylor, sheriff, be restrained from further proceeding with said advertising of said premises; that a receiver be appointed to take charge of and collect the rents of said premises; and that upon the final hearing the legal title to the said premises be declared to be in the plaintiff clear and free of any incumbrances under and by virtue of the levy made in said cause No. 116,677, common pleas court of Hamilton county, Ohio; and that the defendant, Thomas S. Taylor, be perpetually enjoined from further proceeding in said cause.

In the court below a motion was filed by the sheriff "to vacate" the temporary restraining order, which motion was, by the consent of the parties, made in open court, to be regarded as a general demurrer; and on consideration thereof the court granted said motion, regarded as a demurrer and dismissed the petition.

In the hearing of this case in general term the parties consented in open court that the said motion was to be here treated as if it were a general demurrer to the petition.

It will be noted that the execution creditor in the proceedings in the court of common pleas is not made a party to this action; that no relief is sought against Catherine Schubert, and, indeed, no averments are contained in the petition upon which any relief as to her could be predicated, so that the action is, in fact, one against the sheriff of Hamilton county, and against him only.

The plaintiff below seems to have acted upon the assumption that he held the legal title to the real estate against the claim or claims of all persons whomsoever; but this was not the fact. If the contract he describes in his petition existed between him and his sister, it gave him an equitable lien upon the said real estate, and the deed conveying to him the legal title to the said real estate can be treated as no more than an equitable mortgage.

Plaintiff seeks to divest Anna Flagg, plaintiff in the cause tried in the court of common pleas, of the lien which she obtained by virtue of her levy of execution in that action, although she is not made a party to the action in which that is attempted to be done. Plaintiff seeks to restrain the sheriff from performing a plain legal duty imposed upon him by law. The court has no power to do that, for he could not be restrained in an action where the title or rights of Anna Flagg were concerned.

The plaintiff in error asks for the appointment of a receiver to take charge of and collect the rents of the premises described in the petition, but by his own averments he shows that the legal title was conveyed to him, and presumably he is in possession of the property; therefore, the appointment of a receiver is manifestly unnecessary.

We see no error in the action of the court below, and its judgment is affirmed.

Loewenstein v. Rheinstrom Bros.

ERROR.

[Superior Court of Cincinnati, General Term, 1900.]

Smith, Dempsey and Murphy, JJ.

DANIEL LOEWENSTEIN V. RHEINSTROM BROS.

PARTIES IN ERROR CANNOT BE ADDED AFTER TIME FOR FILING.

All the parties to a joint judgment are necessary parties to a petition in error by one of them; and while omitted parties may be brought in by amendment, such parties must nevertheless be brought in within the period for filing petitions in error or the reviewing court will have no jurisdiction.

*D. Thew Wright, Jr., for Loewenstein.**Jacob Shroder, for Rheinstrom Bros.*

DEMPSEY, J.

On May 26, 1900, Rheinstrom Bros. recovered at special term a judgment against Jennie Steinau and Daniel Loewenstein jointly for the sum of \$993.57, with interest thereon from April 2, 1900; to this judgment Daniel Loewenstein alone excepted. On August 15, 1900, Daniel Loewenstein filed in the general term his petition in error to reverse the aforesaid judgment. Rheinstrom Bros., the plaintiffs in the cause below, were alone made defendants in error, and were duly served on August 17, 1900. On September 26, 1900, Rheinstrom Bros. filed their motion in this court to dismiss said petition in error, for the reason that the said Jennie Steinau, one of the parties below, is not made a party to said petition in error, and as a consequence this court is without jurisdiction to entertain such petition. On October 6, 1900, Jennie Steinau entered her appearance to the petition in error herein and consented to be made a party thereto. On October 9, 1900, an amended petition in error was filed setting forth certain facts as to the nature of the judgment against said Jennie Steinau. On the same day a motion was filed to make Jennie Steinau a party defendant in error because she had been omitted by mistake and inadvertence. On October 12, 1900, Rheinstrom Bros. filed their motion to strike from the files the amended petition in error for various reasons therein set forth. These various motions are now before us for decision.

The limitation for filing petitions in error is four months from the date of the judgment or order complained of.

In Smetters v. Rainey, 14 Ohio St., 287, it was settled that all the parties to a joint judgment are necessary parties to a petition in error by one of them. And while it was held that in cases of omission of parties amendment might be allowed, it was further held that such omitted parties must be brought in within the period allowed for filing petitions in error; otherwise the reviewing court would have no jurisdiction. Smetters v. Rainey has been severally criticized in three subsequent cases, but it has never been overruled.

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In Abair v. Bank, 2 Circ. Dec., 165, in an exhaustive opinion by Scribner, J., all of the cases up to that time are collected, analyzed and reviewed and the conclusion reached that Smetters v. Rainey was still law in Ohio.

In 1877, in Burke v. Taylor, 45 Ohio St., 444, and subsequent to Judge Scribner's decision, Smetters v. Rainey was again distinctly approved and followed.

In view of this line of authority we feel that we have no independent judgment in this question, and that we are bound by the rule as laid down in Smetters v. Rainey. As a consequence it follows that the motions of Rheinstrom Bros., to dismiss the petition in error and to strike the amended petition in error from the files, must be granted. The motion to make Jennie Steinau a party defendant in error must necessarily be denied.

ESTOPPEL.

[Superior Court of Cincinnati, General Term.]

Smith, Dempsey and Murphy, JJ.

HERMAN EGGERS V. CLARA M. REEMELIN.

ESTOPPEL—MISTAKE OF LAW.

Estoppel *in pais* does not arise against one who seeks to recover expense incurred in shoring up his building to protect it against an excavation by his neighbor to a depth of twelve feet, said shoring up having been done and paid for by plaintiff before the twelve-foot excavation law was declared unconstitutional, and in the belief that it was a valid law.

F. T. Cahill, for plaintiff.

Louis Reemelin, for defendant.

SMITH, J.

The plaintiff is now and long prior to 1894 was the owner of real estate on the west side of Elm street in this city, and the defendant is now and during the same period of time has been the owner of real estate next adjoining that of plaintiff on the north side. The house of plaintiff was built up to the north line, and the house of defendant was built up on its south side to the same line. The foundation of plaintiff's house extended nine feet below the curb.

In the year 1894, defendant began the erection on his lot of a house whose foundation was to be twelve feet below the curb, as was allowed by the law in force at that time.

Both the plaintiff and defendant knew of this law at the time defendant erected this building, and as the wall of plaintiff only extended to a depth of nine feet below the curb, and as it was necessary in order to protect the building of plaintiff that his building should be shored up and his wall extended from nine feet to twelve feet, both parties sup-

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posed it was the duty of plaintiff to shore up his building and extend his wall and to pay the expense of the same. Plaintiff therefore did the work required, and the amount paid therefor was \$250.

After the work was done the twelve-foot law was declared unconstitutional by this court on the ground that it was special legislation; *Emery v. Coles*, 7 Dec., 414; and then for the first time the parties here-to learned that the work done by plaintiff, and the expense borne by him, should have been done and borne by the defendant.

Thereupon plaintiff brought suit against the defendant to recover the sum of \$250, with interest from November 1, 1894, the date of the completion of the work done, and payment made by him. Upon the hearing in the court below the court gave judgment for the defendant and dismissed the case. Plaintiff prosecutes error to this court to reverse that judgment.

It is apparent from the statement of facts that the plaintiff has done work and incurred an expense for the same which it was the duty of defendant to do and pay. It is also apparent that if plaintiff had not done the work and paid for it, the defendant would not, and the house of plaintiff would have fallen down. Is the defendant relieved from liability to reimburse plaintiff for this expense to which he has been put by reason of defendant's act of building his house, simply because both parties believed that the law imposed upon plaintiff the duty of doing the work and paying for it?

The defendant contends that the plaintiff is estopped now to assert that it was the duty of the defendant to do the work.

It is difficult to see a basis for an estoppel against the plaintiff. He made no statement of fact to the defendant. If he made any statement at all it was that the law allowed the defendant to dig twelve feet below the curb, but the plaintiff no more made this statement to the defendant than the defendant made the same statement to the plaintiff. In truth neither can be said to have made a statement to the other. Both believed the law allowed the defendant to dig twelve feet below the curb. The statute did give the defendant such a right, but the law was unconstitutional. Neither party being a constitutional lawyer they acted under a mistake of law. Surely under such circumstances natural justice would seem to dictate that the obligation of the defendant to pay should not be changed by this mutual mistake of the parties.

And if we look at the question solely from the legal point of view, does it not resolve itself into this: that the defendant refused to do work which he should have done, and the plaintiff did it believing it was his duty to do it, and the question therefore is, does the mere belief of plaintiff deprive him of his right to reimbursement against the defendant? We think it does not.

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An estoppel *in pais* arises not alone from a statement of fact which is untrue, but must also rest upon a basis of knowledge upon the part of the one making the statement that it is untrue.

In *Ensel v. Levy & Bro.*, 46 Ohio St., 255, our Supreme Court declares that an estoppel *in pais* follows only under the following circumstances viz: "Where one person, by his act or declaration, made deliberately and with knowledge, induces another to believe certain facts to exist, and that other person rightfully acts on the belief induced and is misled thereby, the former is estopped to afterwards set up a claim based upon facts inconsistent with the facts so relied upon, to the injury of the person so misled."

In *Bigelow on Estoppel* (5th Ed.), pp. 772-3, where many cases are cited, the author says:

"The representation in order to work an estoppel * * * must generally be a material statement of fact. It can seldom be that a statement of opinion or of a proposition of law will conclude the party making it from denying its correctness; except where it is understood to mean nothing but a simple statement of fact. Thus if an endorser of a note were to say that he was liable thereon, and show the notice of dishonor, he could not afterwards allege against one who had thereby been induced to purchase the note, that he had not received notice of dishonor. * * * The rule we apprehend to be this: That where the statement or conduct is not resolvable into a statement of fact as distinguished from a statement of opinion, or of law, and does not amount to a contract, the party making it is not bound, unless he was guilty of clear, moral fraud, or unless he stood in a relation of confidence toward him to whom it was made. If the statement, not being contracted to be true, is understood to be opinion, or a conclusion of law from a comparison of the facts, propositions or the like, and *a fortiori*, if it is the deduction of a supposed rule of law, the party may, with the qualification stated in the last sentence, allege its incorrectness."

In *Cleveland v. Cleveland R. R.*, 93 Fed. Rep., 113 (Syl. 4): "The conduct of a party to be made the basis of estoppel against him must be viewed in the light of the understanding he then had of his rights, and not in the light of such rights, as they be thereafter determined."

In *Wright v. Stice*, 173 Ills., 571 (Syl.): "A party in possession of land, even though he recognizes the title in another, may afterwards set up title in himself, if he shows that his recognition was based on a misapprehension. Representations by word or conduct which induce another to act in a certain way can not be regarded as constituting an estoppel *in pais*, unless made with full knowledge of the facts, or there is gross negligence in failing to learn them."

In *Henshaw v. Bissell*, 85 U. S. (18 Wall.), 255-271: "An estoppel *in pais* is sometimes said to be a moral question. Certain it is that to the enforcement of an estoppel of this character, such as will prevent a

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party from asserting his legal rights to property, there must generally be some degree of turpitude in his character which has misled others to their injury.

"Conduct or declarations founded upon ignorance of one's rights have no such ingredient, and seldom work any such result. * * * There must be some intended deception in the conduct or declarations in the party to be estopped, or such gross negligence on his part as to amount to constructive fraud."

See also Brandt v. Va. Coal Co., 93 U. S., 326, 336; Davis v. Davis, 26 Chal., 23; Hale v. Hale (Va.), 19 S. E., 739; Dean v. Parker, 88 Chal., 283; Smith v. Sprague (Mich.), 77 N. W., 689; Whittaker v. Williams, 20 Conn., 98; Giersteberger v. Duzen, 76 N. W., 233; Plumme v. Mold, 22 Minn., 15; Sims v. City, 179 Ind., 446; Holcomb v. Boynton, 151 Ill., 249.

These are but a few of the many cases in the books in point.
Judgment below reversed.

LIFE INSURANCE.

[Superior Court of Cincinnati, General Term, 1900.]

Jackson, Dempsey and Murphy, JJ.

OHIO MUTUAL LIFE ASSOCIATION, ETC., v. MARY DRADDY.

1. POLICY AS TO HEALTH CERTIFICATES.

It is the policy of the law to construe health certificates made to life insurance companies for reinstatement under lapsed policies, favorably to the assured, and where there is any doubt as to the proper construction that doubt should be resolved in favor of the applicant.

2. DEFINITION OF SOUND HEALTH.

In life insurance "sound health" means that state of health which is free from disease or ailment that seriously affects the general healthfulness of the system; not a mere indisposition.

3. RULE AS TO STATEMENTS IN HEALTH CERTIFICATES.

An assured, in making health certificates for reinstatement under a lapsed policy of life insurance, that "I am now, to the best of my knowledge, in the same sound condition of health as when last examined by the physician of the Ohio Mutual Life Association. I have not now, and have not since said examination, any illness or injury, nor any medical treatment, or ailment affecting my health, so far as I know," was not required to set forth an illness or injury, a mere indisposition, for instance, which did not affect his sound health, as above defined; and the same rule is applicable to statements regarding medical attendance, which, in order to be required to be set forth, must have been with respect to an illness, injury or ailment affecting sound health.

4. TO RENDER STATEMENT FALSE—KNOWLEDGE BY ASSURED.

Where assured, in making such certificates, certified that "I have not now, and have not since said examination, any illness or injury, nor any medical treatment, or any ailment affecting my health, so far as I know," to render such certificate false by reason of a failure to set forth illness, injury, or medical attendance, it must appear that assured, when he signed the certificate knew that such injury, illness or ailment affected his sound health, or that the medical attendance was with respect to any injury, illness or ailment affecting his sound health.

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5. RULES APPLIED TO FACTS.

Under foregoing rules, a failure, in making such certificates, to set forth the fact that assured had suffered from a stomach disorder, of a more or less serious nature, does not avoid the policy where the evidence fails to show that assured was told by any of his physicians that the malady was serious, or that he knew he was being treated for serious trouble, and it appears that he was not confined to his bed, but was able to pursue his ordinary vocations.

6. OBJECTIONABLE INTERROGATORIES—DEFINITIONS OMITTED.

In an action against a life insurance company, under a policy which had lapsed and had been reinstated upon health certificates by assured, which were claimed to be false by the insurance company, an interrogatory as to whether assured "had any illness affecting his health between the times when he was examined by the physician of the defendant association for admission to membership therein and the time he signed * * * health certificates," without including a definition of "sound health," which, under the facts stated in preceding paragraphs, was an important question, is objectionable and was properly refused; and the same rule is applicable to an interrogatory regarding ailments.

7. REQUESTS TO CHARGE BEFORE ARGUMENT—ERROR.

While it is a right of either party to have correct written instructions given by the judge to the jury before argument, when properly asked, to make a failure to give such instructions available on error, it must appear affirmatively that they were requested before the argument and that exceptions were taken to the refusal to give them.

HEARD ON ERROR.

Boyce & Boyd and *M. C. Slutes*, for plaintiff in error.

Wilby & Wald, for defendant in error.

JACKSON, J.

This was an action brought by Mary Draddy to recover as beneficiary, the sum of \$1,000 upon a policy of insurance issued by the Ohio Mutual Life Association upon the life of her husband, Frank R. Draddy.

It is admitted that the said Frank R. Draddy died on April 17, 1898, and that he became a member of the said association on December 10, 1892.

It is, however, contended, on behalf of the association, that at three dates subsequent to the issuance of the policy in question, namely, on February 1, 1896; August 8, 1896, and August 11, 1897, the said Frank R. Draddy failed to pay the premium when due on the said policy, and that in each instance a reinstatement was procured by the insured signing a health certificate, and that the deceased's membership in the said association became void by reason of certain alleged false statements made by the deceased in the said health certificates.

The certificates in question are as follows:

"This certifies that I am now, to the best of my knowledge, in the same sound condition of health as when last examined by the physician of the Ohio Mutual Life Association. I have not now, and have not since said examination, any illness or injury, nor any medical treatment, or any ailment affecting my health so far as I know."

"I make this statement, understanding that if my lapsed membership in said association is renewed, it will be upon faith in the foregoing

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representations, hereby waiving inquiry by the association as to the foregoing warranted declarations. I also agree that the association is not bound to accept any future lapsed payments from me, by reason of doing so in this case."

It is conceded that prior to the time of signing these renewal certificates the deceased had suffered from a stomach disorder, of a more or less serious nature; but the evidence fails to show that the deceased was told by any of said physicians that his malady was of a serious nature, and there is no evidence tending to show that Draddy did, in fact, know that he was being treated for any serious trouble. The evidence shows that the deceased was not at the times in question confined to his bed. On the contrary, he was at all times able to pursue his ordinary vocation. Nevertheless it is claimed by plaintiff in error that the policy became vitiated by reason of these facts.

The jury rendered a verdict in favor of the plaintiff and for the full amount of the policy and interest.

Plaintiff in error claims prejudicial errors in the following respects:

1. Charge of the court. (a) Error of the trial court in his general charge to the jury in construing the health certificate. (b) Refusal of the trial court to give the special charges requested by plaintiff in error. (c) Granting the special charge requested by defendant in error.

2. Refusal to submit to the jury the interrogatories requested by plaintiff in error.

3. That the verdict is clearly against the weight of the evidence.

The charge of the court construing said health certificate is as follows:

"My construction of the language of these representations is that he is not required to enumerate any illness or injury which did not affect his sound health, as I have previously described it; that a mere indisposition, for instance, is not covered by that; that the same is true as to the medical treatment referred to; it must have been with respect to some illness, injury or ailment affecting such sound health; and if he suffered from any ailment, as distinguished from an illness or injury, such ailment must have been one affecting such sound health. But inasmuch as the representations contained the phrase "so far as I know," even though the illness, injury or ailment affected his sound health, or the medical treatment was with respect to an illness, injury or ailment affecting his sound health, yet, if the said Draddy did not know, at the time he signed the certificates, that the injury, illness or ailment affected his sound health, or that the medical treatment was with respect to any injury, illness or ailment affecting his sound health, the representations are not untrue within the meaning of the certificate."

The contention of plaintiff in error is that the words "any illness or injury," and also the words "nor any medical treatment," are not qualified by the words "affecting my health;" that it is only the words

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"or any ailment," appearing in the last clause of the certificate, which is qualified by the words "affecting my health;" and that it was the duty of the applicant to make known any illness or injury whatsoever, or any medical treatment which he had received.

We are unable to take this view of the construction of the certificate of health, and think the court properly construed the certificate in question.

It is the policy of the law to construe such certificates favorably to the applicant, and where there is any doubt as to the proper construction, that doubt should be resolved in favor of the applicant.

Plaintiff in error further alleges error on the part of the trial court in its refusal to give special charges marked A, D, E and F, on page 46 of the record. It is conceded that these charges were substantially given by the court to the jury in its general charge. Nevertheless it is contended that the court erred in not giving them to the jury before the arguments of counsel to the jury. The record, in this respect, states the following: "And thereupon counsel for defendant asked the court to give the following special charges." The failure of the court to give the special charges before the argument to the jury, under these circumstances, we do not regard as error. The precise question has been decided in *Cincinnati Street Railway Company v. Jenkins*, 11 Circ. Dec., 130, in which it was held:

"While it is the right of the party to have correct written instructions given by the court to the jury before the argument of the case to the jury commences, when properly asked, to constitute error as to this it must affirmately appear from the record that the court was requested to give such instructions before the argument, and that its refusal to do so was the subject of an exception."

Although the instructions in question were presented to the court before the argument, the record fails to show that they were requested by counsel to be given to the jury before the argument began.

Plaintiff in error further alleges error in the giving by the court to the jury of the following special charge requested by defendant in error:

"In life insurance 'sound health' means that state of health which is free from disease or ailment that seriously affects the general healthfulness of the system; not a mere indisposition.

"If you find that prior to February 1, 1896; August 3, 1896, and August 11, 1897, when he signed the three certificates mentioned in the answer, Frank R. Draddy had any illness or ailment and medical treatment therein, yet unless he knew, at those dates respectively, that such illness or ailment seriously affected his general healthfulness—that is to say, if he honestly believed that he had been suffering from a mere indisposition, your verdict should be for the plaintiff."

So much of the charge in question as defines sound health is in the exact language of the Supreme Court of Ohio defining the term, "sound

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health," in the *Metropolitan Life Insurance Co. v. Howle*, 62 Ohio St., 204. There is, therefore, no error in this respect.

So much of the charge in question as makes the knowledge of the deceased as to his having any serious ailment, a necessary element for the defense, we think, is also supported by *Hunter v. International Fraternal Alliance*, decided by this court and reported in 7 Dec., 289, and cases therein cited.

The next error alleged is that the court erred in its refusal to submit to the jury three several interrogatories.

The first interrogatory is as follows:

"Did said Frank R. Draddy, whose life was insured by the policy sued on herein, have any illness affecting his health between the time when he was examined by the physician of the defendant association for admission to membership therein, and the time that he signed any one of the three health certificates dated, respectively, February 1, 1896; August 8, 1896, and August 11, 1897, known to him at the time he signed any of said certificates?"

We think the court properly refused to give this interrogatory, because it fails to include therein a definition of sound health, which, under the facts and circumstances of the case, was a most important question for the jury to consider.

The second and third interrogatories are likewise objectionable in not containing a definition of what constitutes an ailment affecting sound health, and would, therefore, be misleading to the jury.

We see, therefore, no error in the refusal of the court in this respect.

The third ground of error, namely, that the verdict is clearly against the weight of the evidence, must also be resolved against the plaintiff in error. The record fails to sustain the plaintiff in error's contention in this regard.

It follows that the judgment of the court below must, therefore, be affirmed.

CHARGE TO JURY.

[Superior Court of Cincinnati, General Term, 1900.]

Smith, Dempsey and Murphy, JJ.

CINCINNATI v. EVA LOCHNER.

1. SECTION 5190, REV. STAT., APPLIES TO CHARGES BEFORE ARGUMENT.

The statutory prohibition (Sec. 5190) against any qualification, modification or explanation of a written charge to a jury applies to charges given before argument as well as to charges given after argument.

2. LAW PRESUMES INJURY FROM VIOLATION.

The law will presume injury where such prohibition is violated.

HEARD ON ERROR.

C. J. Hunt and *Wade Ellis*, corporation counsel, for plaintiff in error.

M. F. Galvin, for defendant in error.

SMITH, J.

In this case the court, at the request of the plaintiff in error, gave certain written instructions to the jury before argument.

Subsequently, in the general charge, the court, after charging with reference to the question of law presented by one of the special charges, added: "That is what I meant when I said to you in my special charge that if you find there was a slight defect in the sidewalk, but you find that slight defect was not inconsistent with ordinary care and prudence of the city under all the circumstances of the case, your verdict must be for defendant." To this plaintiff in error excepted.

Section 5190, paragraph 5, Rev. Stat., provides that: "When the evidence is concluded either party may present written instructions to the court on matters of law, and request the same to be given to the jury, which instructions shall be given or refused by the court before the argument to the jury is commenced."

By paragraph 7 of the same section it is provided that: "Any charge shall be reduced to writing by the court if either party before the argument to the jury is commenced request it. A charge or instruction when so written and given shall not be orally qualified, modified or in any manner explained to the jury by the court."

It is contended that the provision of paragraph 7, which forbids any qualification, modification or explanation of an instruction does not apply to the instructions provided for in paragraph 5; but we are not of that opinion. It would be, it seems to us, a strange condition of the law which would forbid any qualification, modification or explanation of a written charge or instruction if given after argument, but would allow it

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if the instruction is given before argument. The reason for the prohibition applies with the same force in all cases. 19 Ill., 82.

Nor do we think we are permitted to say there was no prejudice to plaintiff in error. The law expressly forbids any explanation of an instruction, and we think that by reason of such express prohibition the law presumes injury when it is violated.

Judgment reversed.

JUSTICES OF THE PEACE—PROOF.

[Hamilton Common Pleas, 1900.]

GEORGE SCHAUPP v. THOMAS JONES.

1. SECTION 591, REV. STAT.

Section 591, Rev. Stat., providing that justices of the peace shall not have jurisdiction of any action in which the title to real estate is sought to be recovered, extends to actions in which title is involved in the construction of a will, and to determine which the justice would be required to exercise equity jurisdiction.

2. PROOF OF EXECUTION OF DOCUMENTS.

It is not sufficient to merely introduce a document required by law to be attested, and then rest, when objection is made; the defendant is entitled to proof of the execution of the document; and failure to require such proof constitutes reversible error.

Arnold Speiser and Gray & Tischlein, for plaintiff.

Charles T. Dumont, contra.

SPIEGEL, J.

This case comes into the common pleas court from the jurisdiction of Alexander Roebling, justice of the peace in and for Delhi township, upon a petition in error, alleging that the justice erred in overruling the motion of plaintiff in error to dismiss said case for failure of proof and to render judgment for the defendant.

Second. That the justice erred in overruling the motion of plaintiff in error that the action be dismissed for want of jurisdiction and for judgment for defendant.

The facts in the case are as follows: The Rev. B. M. Muller died in West Jefferson, Ohio, leaving a will containing the following provision: "My house in Cincinnati, 608 Fulton avenue, which I inherited from my dear late father, Nicholas Muller, to be sold, and the proceeds likewise to be divided into four parts, to-wit: First part, to St. Rosa's Catholic church in memory of deceased parents and myself; second part, to my brother, Andrew Muller, or in case of his death to the surviving family; third, to the Most Reverend Archbishop Elder or his successor in favor of diocese; fourth part, to my cousin, Elizabeth Shaupp (nee Gebhart), or in case of her death to her children."

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Under this provision of the will the executor proceeded to sell said house at public auction to Thomas Jones, the defendant in error, who then brought his action in forcible entry and detainer against the plaintiff in error, and recovered judgment for possession. The transcript shows that the only evidence introduced by the plaintiff was the deed from the executor and that then he rested, to all of which the plaintiff in error by his counsel objected, and further moved the court to dismiss the case, for failure of proof, and render judgment for him, which motion the justice overruled. The plaintiff in error, George Shaupp, then introduced his evidence, to-wit, that he had been living in said premises with his family for fifteen years last past; that he did not hold from Jones, nor rented or leased from him; that his wife and others were the owners of the premises by reason of the provisions of the will of Rev. B. M. Muller, deceased, and offered a certified copy of the will in evidence. Upon this state of facts the court below rendered a judgment in favor of defendant in error.

The judgment rendered must be reversed, first, because the justice had no jurisdiction; and secondly, if he had jurisdiction, for overruling the motion of plaintiff in error to dismiss the cause for failure of proof.

Section 591, Rev. Stat., provides that justices shall not have cognizance of any action in which the title to real estate is sought to be recovered, or may be drawn in question. The testimony submitted both by plaintiff and defendant clearly draws the title in question, for upon the construction of the will, whether the executor had power to sell, depends upon the title of the defendant in error. To determine this the justice would have to exercise equity power, and as he has only such jurisdiction as is expressly conferred upon him by statute, he can exercise no equity jurisdiction.

It is claimed on behalf of the court below that he had jurisdiction in this cause by reason of sec. 6600, Rev. Stat., which provides that proceedings in forcible entry and detainer may be brought before a justice in all cases of sales by executors, when such sales shall have been examined by the proper court, and the same by said court adjudged legal. No evidence was introduced of these jurisdictional steps, and therefore the judgment below could only have been rendered upon the theory that the will gives power to the executor to sell without the intervention of the probate court. This being the case, what I have said holds good, to-wit, that the case below drew into question the title to real estate, and imposed upon the justice an equity duty to construe a provision of the will, whether the executor had the right to sell without order of court in order to determine whether defendant in error was entitled to the possession of the premises, which he had no power to do under the statute.

But even were I wrong in this holding, the case must still be reversed upon the first ground alleged by petitioner in error, to-wit, that

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the court erred in overruling the motion of plaintiff in error to dismiss said case for failure of proof. Plaintiff below introduced as his evidence of title the deed from the executor and then rested. Defendant below objected to this introduction and moved to dismiss. He was clearly entitled to said dismissal because it is not sufficient to merely introduce a document required by law to be attested and then rest, when objected to, but defendant was entitled to proof of its execution, either by one of the attesting witnesses or the notary or the executor himself.

Upon both of these grounds the judgment must be reversed.

LIBEL.

[Superior Court of Cincinnati, March Term, 1890.]

*MOSES KAHN v. CINCINNATI TIMES—STAR.

1. DEFAMATORY WORDS.

Any written words are defamatory which impute to another that he has been guilty of any crime, fraud, dishonesty, immorality, vice, or dishonorable conduct, or has been accused or suspected of any such misconduct, or which suggest that the person is suffering from an infectious disorder, or which have a tendency to injure him in his office, profession, calling or trade.

2. LIBELOUS PUBLICATION—INTENTION.

Everything printed or written which reflects on the character of another and is published without lawful justification or excuse, is a libel, whatever the intention may have been.

3. MALICE IMPLIED UNLESS PUBLICATION IS TRUE.

Unless the article published was entirely true, the law implies malice and liability will attach and the plaintiff can recover damages.

4. PRESUMPTION IS THAT TRADESMAN'S REPUTATION IS GOOD.

The law presumes every man's reputation as a tradesman to be good until the contrary is made to appear, but such presumption may be rebutted by evidence.

*Judgment affirmed by general term and by the Supreme Court, 52 Ohio St., 662, unreported. In the Supreme Court, Thornton M. Hinkle, for plaintiff in error, cited: Yrisarri v. Clement, 3 Bingh., 441; Townshend, Sec. 137, n. 1 and 2; Cook v. Hughes, 1 R. & M., 112; Thompson v. Barbard, 1 Campbell, c. 48; Thornton v. Stevens, 2 M. & R., 45; Starkie on Slander and Libel, Sec. 725, top p. 548; Burnet v. Phalon, 21 Howard's Pr. (N. Y.), 100; Jones v. King (Ala.), I. S. Reps., 591; Lee v. State, 21 Ohio St., 151; Hamilton v. State, 29 Mich., 173; Coble v. State, 31 Ohio St., 100; Hanoff v. State, 37 Ohio St., 178; Ingraham v. Lawson, 6 Bingh., N. C., 212 and 214; Speer v. Bishop, 24 Ohio St., 598; Marietta & C. R. R. Co. v. Picklesley, 24 Ohio St., 654; Parmlee v. Adolph, 28 Ohio St., 10; White v. Thomas, 12 Ohio St., 312; Thrasher v. Green Co., 16 S. W. Rep., 955; Townshend on Libel, Sec., 392; Manning v. Clement, 7 Bingh. Rep., 363; Hilliard on Torts, 278; Townshend on Libel, Secs. 182 and 183; Pollock on Torts, 212; Hunt v. Bell, 1 Bingh., 1; Yrisarri v. Clement, 3 Bingh., 432; Manning v. Clement, 7 Bingh., 362; Morris v. Langdale, 2 Bos. and Pul., 284; Collins v. Carnegie, 1 A. and H., 695; Johnson v. Simonton, 43 Cal., 269; Newell on Slander and Libel, 191; Starkie on Slander and Libel, Sec. 655; Merrill's Newspaper Libel, 168; 3 Lawson's Rights, Rem. and Pract., Sec. 1250; Dauphin v. Times Pub. Co., 10 Rep., 10; Townshend on Libel and Slander, Sec. 183; Hilliard on Torts, 278; Sprague v. Rooney, 16 S. W. Rep., 505; Hunt v. Bell, 1

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6. PRESUMPTION THAT DEROGATORY STATEMENTS ARE FALSE.

It is a presumption of law that anything stated in a publication which is derogatory to the business reputation and trade of the plaintiff is false, and that the person in publishing the same intended to cause whatever injury naturally would and did result from such publication.

6. PRESUMPTION UPON PUBLICATION OF DEFAMATORY MATTER.

The publication of defamatory matter, libelous of itself, is presumed to be malicious in law unless published in the performance of some legal or moral duty.

7. REPUTATION IN BUSINESS COMMUNITY.

A man's known reputation in a business community where he is known and lives is the resultant of the opinion of all and not the individual opinion of any particular person or persons. Therefore the jury cannot go into particular acts to decide the known reputation of a business man at the time of the publication of a libel.

8. DEFENSE—AGREEMENT TO ACCEPT APOLOGY.

It is a good defense to an action for libel that if after its publication the plaintiff agreed with the defendant to accept the publication of an apology in full of his cause of action, and that such an apology was published, but a mere naked promise unsupported by a consideration, is not of itself sufficient to maintain such a defense.

9. MITIGATING CIRCUMSTANCES MAY BE CONSIDERED.

The presence of mitigating circumstances not making a complete defense to a libelous publication may be considered by the jury in their discretion to diminish their assessment of damages.

10. DETERMINING EXTENT OF INJURY.

The extent of an injury to one in his trade or business, or in his reputation in relation to such trade or business, must depend partly on the nature of the publication; and partly on the character of the extent of his business or trade. A man's reputation in business may be so good as to be firmly established in public confidence, so that it cannot well be injured; or it may be so bad as to be incapable of serious injury; or while good, yet not so firmly established in public esteem as to prevent injury resulting to it.

11. JURY MAY CONSIDER REPUTATION AS TO PARTICULAR BUSINESS.

In determining damages in libel the jury may consider the reputation of the plaintiff as to the particular business in which he was engaged as well as the character and methods thereof.

Bingh., 1; Odgers on Libel, star page, 516; Morris v. Langdale, 2 Bos. and Pul., 284; 2 Kent's Comm., star page, 466; McHugh v. State, 42 Ohio St., 154, 165; Railway Co. v. Cassity, 24 Pac. Rep., 88; Aetna Insurance Co. v. Reed, 33 Ohio St., 283; Cheadle v. Buell, 6 Ohio, 67.

*Kramer & Kramer; Shay, Jackson & Cogan, and Lowrey & Jackson, for defendant in error, cited: Hunt v. Buell, 1 Bingh., 1; Yrisarri v. Clement, 3 Bingh., 432; Manning v. Clement, 7 Bingh., 362; Morris v. Langdale, 2 Bos. and Pul., 284; Collins v. Carnegie, 1 A. and E., 695; Johnson v. Simonton, 42 Ca., 242; Dauphin v. Times Co., 10 Reporter, 10; Marsh v. Davidson, 9 page 580; Townshend on Libel and Slander, page 665; Fry v. Bennett, 28 N. Y., 324; Pomroy's Remedies, Sec. 708; Henneger v. Wetstine, 13 Abb., N. C., 393; 13 Abb., N. C., 398, note; Goodwin v. Insurance Co., 73 N. Y., at p. 496; Kingsley v. Kingsley, 29 N. Y. S., 921; Smith v. Rodecap, 31 N. E. R., 470; Smith v. Rodecap, 5 Ind. App., 479; Swinney v. Nave, 22 Ind., 178; McCoy v. McCoy, 106 Ind., 492; Duval v. Davey, 32 Ohio St., 604; Wilson v. Noonan, 35 Wisc., 321; Speer v. Bishop, 24 Ohio St., 598; Vandevere v. Sutphin, 5 Ohio St., 294, 300; Folkards Starkey on Libel, 673; Manning v. Clement, 7 Bingh., 362; 3 Sutherland on Damages, Secs. 1206-1213; Sanderson v. Caldwell, 45 N. Y., 406; Weiss v. Whittemore, 28 Mich., 366, 374; Starkey on Slander and Libel, 468 and 648; Newell on Libel and Slander, Sec. 36, page 864; Evans v. Harries, 26 L. J. Ex., 22; S. C., 1 H. & N., 251; New York Academy v. Packet, 2 Hilton, 217; Ingraham v. Lawson, 6 Bingh. N. C., 212; Hanoff v. State, 37 Ohio St., 178; People v. Crapo, 76 N. Y., 288.

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12. RULE APPLIED.

In an action for libel by a clothing merchant, whose place of business was spoken of as a place where questionable methods were employed in selling, whose business consists in the sale of goods which he represented to be tailor-made, on special orders, but rejected because of misfits, but which were in fact ready made clothing, the jury, if they find the publication libelous, may consider such fact in ascertaining what damages, if any, he sustained to his business.

13. RULE AS TO COMPENSATORY AND NOMINAL DAMAGES.

Where the plaintiff has suffered real and substantial injuries in his business and been otherwise injured in his business by reason of the publication of libelous matter, he is entitled to compensatory damages; but if he has not suffered any real or substantial injury, he is entitled to nominal damages only to vindicate his right.

14. ALLOWANCE OF COUNSEL FEES.

In actions of tort involving malice, fraud, insult or oppression, the jury may, in estimating compensatory damages, allow reasonable counsel fee of the plaintiff, even when there are mitigating circumstances not amounting to a justification.

15. ALLOWANCE OF PUNITIVE DAMAGES.

That where the publication of libel matter was malicious and with an intention to injure, vindictive or punitive damages may be allowed.

16. AMOUNT OF NOMINAL DAMAGES.

Nominal damages may be presumed from the publication of libelous matter, but the question of the amount thereof must be left to the sound discretion of the jury.

The petition contained two counts. The plaintiff dismissed the second before trial.

The first count alleged that the plaintiff was engaged in carrying on the business of a retail clothing merchant, that defendant published "of and concerning the plaintiff, and of and concerning him as a trader and retail clothier, and of and concerning his character as a merchant," an article, which it copies incorrectly.

MISSING WILLIAM KNEDLER,

"A VICTIM" SUGGESTS THE MANNER IN WHICH HE MAY HAVE MET HIS DOOM.

Both yesterday and today a sleek looking little man in a beaver hat has been seen flying in and out of Chief Hazen's office, evidently laboring under a severe attack of mental perturbation. This gentleman is named Kahn, but he is better known to the public as the proprietor of that queer looking store, whose windows and doors are heavily curtained, known as the O. M. C. P., and situated at the southwest corner of Seventh and Vine. The police have long looked with suspicion on this store, because of several complaints as to the way business is done there. Yesterday Col. Hazen sent Detective Hudson down to bring the proprietor before him, because of the receipt of the following anonymous letter, evidently written by a business man:

"Chief Deitsch:

"DEAR SIR: This afternoon I saw an account of a young man who came from the country to purchase a suit of clothes, and who is mysteriously missing. It called to my memory an exciting predicament I was in five years next November. It was on a Saturday night when I went to the Misfit Parlors, southwest corner Seventh and Vine streets. That night I escaped through strategy.

"ONE WHO CAME NEAR BEING A VICTIM."

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"P. S. They have search underground traps or graves to hide their victims. There should be a thorough secret made under the stairways, cellar, yard, closets and even between the floors and ceilings."

The young man referred to in the opening of the letter is William Knedler, of Foster's Crossing, O., who disappeared suddenly week before last, and has never been heard of since. The relatives of the missing man have even looked through the vats of medical colleges where the corpses are "in pickle." It is believed that he has met with violence.

The story about murders and traps at the O. M. C. P., is not credited at police headquarters, but Kahp was sent for on general principles. He became much excited over the matter and has been rushing to and fro, consulting legal authority and protesting against the pretty broad charges of unfair dealing at his store that were made by several of the police.

Charge to the Jury:

HUNT, J.

Gentlemen of the Jury—This is an action in which the plaintiff, Moses Kahn, complains of the defendant, The Cincinnati Times-Star Company, a corporation organized under the laws of Ohio, for that, the defendant on April 14, 1888, maliciously composed and published of and concerning the plaintiff as a trader and retail clothier, and of and concerning his character as a merchant, a certain false and malicious libel, which is fully set forth in the petition.

The plaintiff further avers that by reason of the grievances set forth he has been greatly injured in his reputation and trade, and has lost a large number of customers, the names of whom, particularly, the plaintiff is unable to state, and has suffered a diminution of his business to a great extent, and has been otherwise injured in his reputation to his damage in the sum of twenty thousand dollars, for which he asks judgment.

The defendant by an amended answer admits that it is a corporation, organized under the laws of Ohio; that it is engaged in the business of printing and publishing a newspaper called the Times-Star; that it published the article set forth in the petition; but denies each and every allegation set forth in the petition.

The defendant, for a second defense, pleads that the article in question appeared on April 13, 1888, in the Times-Star, in what is known as the six o'clock edition, an edition of comparatively small circulation; that the matter contained in the article would have appeared on the following day in the editions of April 14, except the six o'clock edition, according to the course of business in the office of the defendant, but for the agreement entered into by plaintiff and defendant by which the plaintiff, on April 14, aforesaid, and after said publication, through his authorized attorney, appeared at the office of the defendant and thereupon agreed with defendant, that, if defendant would not publish said article on April 14, that the plaintiff would consider the matter of the publication on the thirteenth to be adjusted and settled, and that he would make no claim against defendant by reason of said publication,

and, that the defendant in accordance with said agreement withdrew said article from further publication.

A reply has been filed which puts in issue the second defense in the amended answer.

The first question for you to decide, therefore, is whether the article in question amounts to a libel upon the plaintiff, and, to this end it will be necessary to determine what constitutes a libel.

The constitution of the state of Ohio, in sec. 11, of the bill of rights, provides that every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right, and no law shall be passed to abridge or restrain the liberty of speech or of the press. The publisher of a newspaper has exactly the same rights and responsible to exactly the same extent for the abuse of that right as any other citizen. His right and responsibility in the matter of a publication are no less than that of others under like circumstances. A libel may be defined to be a wrong occasioned by writing or effigy. It has been held, in reference to an individual injury, to be a false and malicious publication against one, either in print or writing, or by pictures, with intent to injure his reputation, and expose him to public hate, contempt, or ridicule. Indeed, everything printed or written, which reflects on the character of another, and is published without lawful justification or excuse, is a libel, whatever the intention may have been. Any written words are defamatory which impute to another that he has been guilty of any crime, fraud, dishonesty, immorality, vice, or dishonorable conduct; or has been accused or suspected of any such misconduct, or which suggests that the person is suffering from an infectious disorder, or which has a tendency to injure him in his office, profession, calling, or trade.

A libel consists in the abuse of that constitutional right by maliciously writing or printing of and concerning another, any language or representation which is false and the natural tendency and effect of which are to injure such other person, as in this case, in his business standing and reputation in the community where he lives and is known, or in his trade or business, and hold him up to ridicule or contempt, or in any way to lessen him in public esteem.

It will be your duty to take the article submitted in evidence, read it carefully as a whole and in detail, and decide as men of judgment and experience whether, as contended by the plaintiff, it had such a tendency and effect, or any of them, so far as the business reputation of the plaintiff or his calling or his trade are concerned, or whether, on the other hand, as claimed by the defendant, it can not be fairly said to have had such tendencies or effect, or any of them.

If in your judgment the publication of the article had no such tendencies or effect as have been mentioned, it will be your duty to return a verdict for the defendant without proceeding further in the case.

If, however, by reason of the publication of the article, you should find that the plaintiff was injured in his reputation and trade, and has suffered a diminution of his business as a retail clothier, and has been otherwise injured in his business reputation, then your verdict must be for the plaintiff, because it is a presumption of law that anything stated in such publication which is derogatory to the business reputation and trade of the plaintiff as alleged, is false, and the law further presumes that the defendant in publishing the same intended to cause whatever injury naturally would and did result from such publication.

It will be your duty next to consider whether your verdict, if for the plaintiff, shall be for nominal or for substantial damages. In this connection it will be necessary to determine whether, under all the circumstances disclosed by the evidence, the plaintiff has suffered a real and substantial injury to his trade or business reputation, or whether he has suffered only what is termed in law as a nominal injury. Nominal damages may be presumed from the publication of libelous matter, but the question of the amount of such nominal damages must be left to the good judgment of the jury to be exercised upon all the evidence. The amount awarded for nominal damages must rest in the sound discretion of the jury and may not exceed one cent.

The plaintiff contends that he has been greatly injured in his business reputation, and has lost a large number of customers, and has suffered a diminution of his business to a great extent and has been otherwise injured in his reputation. If you find that the plaintiff has in fact not suffered any real or substantial injury in these respects, he is entitled to nominal damages only to vindicate his right.

If the plaintiff suffered real or substantial injuries, as alleged, then he is entitled to receive such a sum as in your judgment would fairly compensate him for such loss. It may be regarded as settled in this state that in actions of tort involving malice, fraud, insult or oppression, the jury may, in estimating compensatory damages, take into consideration the reasonable counsel fee of the plaintiff in prosecuting this action for the redress of his injuries against the wrong-doer, even when there are mitigating circumstances not amounting to a justification.

In order that you may pass intelligently upon this question of damages, if any damages are to be awarded, it will be proper for you to consider the character and extent of the business in which the plaintiff was engaged, as well as his previous reputation in such trade or business. The extent of an injury to one in his trade or business or in his reputation in relation to such trade or business, must depend partly on the nature of the publication itself, and partly on the character and extent of his

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business or trade. For instance a man's reputation in business may be so good as to be firmly established in public confidence, so that it can not well be injured by any such publication as that of which the plaintiff complains; or it may be so bad as to be incapable of serious injury therefrom; or while good, yet not so firmly established in public esteem as to prevent injury resulting to it. The law presumes every man's reputation as a tradesman to be good until the contrary is made to appear. The testimony on that subject must be carefully weighed and considered. If you find the publication a libel, as the term has been defined, it will be left to you after all to say to what extent, under all the circumstances and evidence, his reputation in business has been damaged thereby, and to what extent he has been damaged in his trade and business, subject only to the propositions of law which have been suggested by the court.

A man's known reputation in the community or general estimation in which he is held in the business community, where he lives and moves and is known, while it is the resultant of the opinion of all, it is not the individual opinion of any particular person or persons. You will decide what the known reputation of the plaintiff was at the time of this publication, for in view of all the evidence you are limited to his business reputation, and you can not go into particular acts.

There is no way of reaching a correct conclusion in cases like the one on trial except through the good judgment of the jury. The law, therefore, permits the jury to take such a view of all the facts and circumstances, properly in evidence, in the assessment of damages and as may appear fairly from the preponderance of the evidence. It may appear to you that the publication complained of was made only with such malice as the law implies from the mere doing of a wrongful act, which is recognized in the law as implied malice; or with an actual evil intent or express purpose to injure; or that it was not only false, but known to be so by the defendant at the time of the publication itself, or wantonly made without inquiry or information upon which the defendant was fairly justified in relying; or that there was nothing in the character, conduct or position of the plaintiff to palliate or excuse such publication. It may appear to you, on the contrary, that while the defendant may not convince you that he should escape the actual consequences of the alleged libelous matter, if wrongful in fact, yet there was no actual malice on the part of the defendant, no real or conscious intent to injure, no bad motive; that though in fact false, the defendant in making the publication acted upon information on which he was fairly justified in relying; that there was more or less truth, or a greater or less approach to the truth in this publication, or that there was something in the business reputation of the defendant, or in the methods of doing business or in the character of the business itself, or in any reports which may have existed in police circles, or in the letter as introduced in evidence—any such infor-

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mation may have reached the defendant prior to the publication itself—to palliate in a greater or less degree, or excuse in a greater or less measure the publication itself.

In case you find all or any of the circumstances last mentioned to have existed, while they do not make out a complete defense to entitle the defendant to a verdict—if you first find the publication in fact to be libelous—they are yet matters which you have a like discretion to consider and diminish your assessment of damages accordingly, in case you award damages to this plaintiff at all. These, in legal definition, are termed mitigating circumstances.

In ascertaining whether there were mitigating circumstances, or whether there were aggravating circumstances, it will be proper for you to consider all the evidence, direct and circumstantial, in order that you may reach a correct conclusion. It is the province of the court to instruct you of the law; it is the province of the jury to analyze and weigh the evidence. It is the province of the court to pass upon the competency of the testimony; it is the province alone of the jury to weigh that testimony.

The defendant, in its amended answer, pleads as a second defense that an agreement was entered into by the plaintiff and defendant, through counsel. It is a good defense to an action for libel, that if after the publication the plaintiff agreed with the defendant to accept the publication of an apology in full for his cause of action, and that such an apology had been published. The burden of proof, however, in such a defense as is alleged in the amended answer is upon the defendant, to show that such an agreement was made, and that there was a good consideration for the same, and that it was carried out in good faith, and that the plaintiff so agreed to accept such retraction in full satisfaction of any claim which he may have had by reason of the publication. The evidence on this point must be governed by the proposition of the law as I have indicated it. A mere naked promise in the case, unsupported by a consideration, is not of itself sufficient to maintain such a defense.

It will be your duty, gentlemen of the jury, to consider all the evidence that has been adduced in this case and apply your best judgment to all the facts and circumstances presented by the evidence under the law which has been given you by the court. The law will not be satisfied with anything less than a faithful discharge of the obligations which you assumed when you took the oath to render a true verdict according to the law and the evidence in this case.

The plaintiff has asked for certain special charges, which will be given, as follows:

“1. If defendant published the article in manner and form as alleged in the petition, and the jury should find the same libelous, and injury and damage to his business and general business character directly

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resulted to the plaintiff from and by reason of such publication, he will be entitled to recover damages, and in awarding to him any compensatory damages, if he is entitled to such, you may take into consideration and include reasonable fees of counsel, employed by plaintiff in the preparation and prosecution of this action.

"2. If you find that the publication was libelous and that there was express malice, or a bad motive and an evil intent to injure in the publication, you may go beyond mere compensation and award vindictive or punitive damages to the plaintiff; that is, damages by way of punishment, and the jury in its discretion can determine what such damages should be.

"3. I charge you that, unless the article published in its entirety was true, in fact the law implies malice if it should be found that the article in question is libelous, and liability will attach, and the plaintiff can recover damages from the defendant.

"4. I charge you that, if you find the article in question libelous, and that such libelous publication concerned the business reputation of the plaintiff, or trade of the plaintiff, by imputing to him any kind of fraud, dishonesty, misconduct, incapacity, or unfitness, an action will lie without proof of actual malice, or of actual pecuniary loss, and the jury can determine the amount of damages to be allowed to the plaintiff. And in determining such damages the jury may take into consideration the reputation of the plaintiff as to the particular business in which he was engaged, as well as the character and methods of the particular business or trade in which he was engaged. The publication of defamatory matter libelous of itself is presumed to be malicious in law, unless published in performance of some legal or moral duty.

"5. All the testimony that the defendant, The Times-Star Company, has offered, with reference to the conduct of the plaintiff's business, or in other words, as to the manner in which he did business at the corner of Seventh and Vine streets can not be considered by you to justify the publication of this article, if the article should be found to be libelous, but, if considered by you, must be only taken in connection with all the testimony and facts and circumstances in the case, to mitigate or lessen the damages that you may find the plaintiff is entitled to recover."

I will also give you the following special charges asked for by the defendant:

"1. If, from a fair preponderance of the evidence the publication appears to be true, the jury may, in view thereof return a verdict for nominal damages only.

"2. If you find it to be a fact that the plaintiff in his business sold goods which he represented to be tailor-made goods, made on special orders, but which were in fact what is known as ready-made clothing, you may take that fact into consideration by way of mitigation of the damages claimed for injury to plaintiff's business."

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The defendant has also asked me to give the following charge:

"3. If you find the plaintiff's business consists in the sale of goods which he represented to be custom or tailor-made goods, made on special orders, but rejected because of misfits, but which were in fact what is known as ready-made clothing, then you can not award him damages for loss or injury to his said business."

Which I decline to give, but will give you in place thereof the following:

"If you find that the plaintiff's business consists in the sale of goods which he represented to be custom or tailor-made goods, made on special orders, but rejected because of misfits, but which were in fact what is known as ready-made clothing, then you can take all these facts and circumstances into consideration in ascertaining what damages, if any, he may have sustained; but, it will be your duty to ascertain whether or not the publication was libelous before any damages can be awarded."

Counsel for defendant also requested the court to give the following special charges, which the court refused:

"1. If you find that in plaintiff's said business he sold goods which were what were known as ready-made goods but which he represented to be what is known as tailor, custom-made, goods, made on special orders and rejected because of being misfits, you can not allow to him in this case any damages for loss or injury to his said business.

"2. The measure of damages for loss to business is not the amount by which sales may have fallen off, but the loss of the profits which plaintiff would have made on such lost sales. You must find from the evidence what that profit was, and must also find that the falling off of sales was due to the publication complained of; and in estimating the loss of trade or business you will take into consideration all the evidence."

Counsel for defendant excepted to the action of the court in refusing to give the special charges requested by defendant; and to the special charges given at plaintiff's request; and to the modifications of special charge asked by the defendant and made by the court.

Mr. Kramer: "We except to each and every one of the special charges given for the defendant. Except to that part of the general charge which says that nominal damages can not be over one cent; we except to the amended charge as to nominal damages, unless the court defines what nominal damages consist of. We except to that portion of the charge in which the court says the jury may take into consideration the business reputation of the defendant prior to the time the article complained of was published; and that it was the duty of the court to charge that the jury must find that the business reputation of the defendant was good before the article complained of was published; that the jury have no right to find that it was not good in this case."

Counsel for plaintiff asked the court to give the following special charges to the jury:

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"1. I charge you that you must presume the general business reputation, in this trade, of the plaintiff prior to the publication of the article complained of to have been good, and no testimony having been offered by the defendant to rebut that presumption I charge you for the purpose of this case, the jury have no right to find that the general business reputation in this trade in the community of the plaintiff was not good prior to this publication.

"2. I charge you that I inadvertently erred in charging you before that you have a right to take into consideration the plaintiff's business reputation in his business prior to the publication of this article. I charge you now that you have no right to take that into consideration, but it must be presumed to be good by you."

Which charges the court refused to give, and to which refusal counsel for plaintiff then and there excepted.

And thereupon the court gave the following additional charge to the jury:

"I charge you that the former business reputation of the plaintiff is not to be considered by you in estimating damages. The business reputation of the plaintiff is presumed to be good, but such presumption may be rebutted by evidence; and if the jury find from the evidence that he has suffered damages to his reputation in business by the reason of the alleged publication, if libelous, they may award such damages as may seem proper under all the circumstances, otherwise not.

"It was said to you a moment ago on the question of nominal damages, as excepted to by counsel, that they should not exceed one cent. This is an inadvertence or error in the charge. The amount awarded for nominal damages must rest in the sound discretion of the jury and may be only nominal in amount. So where it was stated that it could not exceed one cent, it will be eliminated from the charge. Nominal damages rest solely in the discretion of the jury and may be simply nominal in amount."

Counsel for plaintiff requested that the special charges go into the jury room, to which counsel for defendant objected, which objection the court sustained, to which ruling counsel for plaintiff then and there excepted.

Whereupon the jury retired to consider of their verdict, and returned a verdict for plaintiff, as appears of record. Whereupon the defendant filed a motion in writing to set aside said verdict and for a new trial on the grounds set forth in said motion, as also appears of record, which motion the court overruled, to which defendant excepted, and rendered judgment, all as appears of record, to which defendant excepted. And thereupon defendant presented this, its bill of exceptions and asked that the same be allowed, signed, sealed and made part of the record, which is now done, at said term.

CONTRACTS.

[Trumbull Common Pleas, February Term, 1890.]

*DAVID S. FOREDYCE v. C. EASTHOPE.

1. CONTRACT FOR A YEAR.

A written contract for services for one year exists where defendant in a letter to and received by plaintiff proposed to hire the latter to labor for him for a year at \$180.00, and the plaintiff by letter accepted the proposal without condition or reserve.

2. CONTRACT OF MINOR—AVOIDANCE.

The contract of a minor is voidable, notwithstanding it is in writing, and he may at any time before reaching his majority, or up to, or even at that time, disaffirm his contract and set it aside; but the burden is upon him to prove his disaffirmance thereof.

3. FACTS WHICH DO NOT JUSTIFY VIOLATION.

Under a contract to work on a farm for a year, voluntarily laboring in excess of a day's labor, without compulsion on the part of the employer, will not justify an employee in quitting his employment during the year.

4. RULE AS TO MEASURE OF DAMAGES.

The rule of damages for the violation of a contract to labor for a year, is the difference between the contract price and the market value of the services of the employee at the time of quitting his employment.

J. E. Pickering and M. Woodford, for plaintiff.

Geo. P. Hunter, for defendant.

The pleadings show that plaintiff:

First. Sues for \$70.00 earned by him as wages.

Second. It is conceded the work was done and was worth that sum.

Third. But payment thereof is sought to be avoided, by setting up an entire contract for a year, and quitting of service of plaintiff (below) before the expiration thereof, without cause; and therefore nothing due.

Fourth. Such construction of contract is denied, and alleges new proposals and inducements acted on by plaintiff (below) alleges justification for quitting in any event, and also sets up minority.

Charge to the Jury.

GILMER, J.

Gentlemen of the Jury: David Foredyce brings this action against the defendant, C. Easthope, to recover for services he alleges to have rendered for the defendant from March 21, 1889, to August 10, 1889, upon his farm.

He says that he worked during this time, and that these services were reasonably worth the sum of fifteen dollars per month, and that in the aggregate it amounts to the sum of seventy dollars.

*This decision was affirmed by the circuit court of Trumbull county, April Term, 1891, and by the Supreme Court without report in 52 O. S., 663.

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There is also another claim for extra hours mentioned in the petition. No proof has been given upon that; and in no event will you consider that part of the claim in the case for the plaintiff has withdrawn that claim from his petition.

To this petition the defendant files his answer in which he admits that the plaintiff worked for him, the defendant, from March 21 to August 10, 1889; admits that his services were reasonably worth the sum of \$15.00 per month, and then by way of denial of plaintiff's claim, he says these services were performed under an agreement by which the plaintiff agreed to work for the defendant for the term of one year at an agreed price of one hundred and eighty dollars, and that without defendant's fault the plaintiff quit his services before the expiration of this time. He then further avers by way of cross-petition, that he has been damaged by reason of this breach of contract on the part of plaintiff in the sum of thirty dollars, and asks judgment at your hands for that sum.

To this answer the plaintiff makes reply and says, that if there was a written contract, that still all the terms of that contract are not fully set forth in writing, and one reply to the defendant's answer is, that the requirements of the defendant were such that it was impossible for him to perform them and that he was obliged to quit; that he quit on account of the fault of this defendant and not on account of his own fault. He further says, that when this contract was made he was a minor and that he disaffirmed the contract, and that whatever services he rendered were not rendered under the contract claimed by the defendant, under the admissions made by counsel and the admissions in the answer in this case.

Defendant's counsel have had the opening and closing arguments to you, and the first question the court would direct your attention to is whether or not there was a contract made as alleged in the defendant's answer.

The burden of proof would be upon the defendant to satisfy you by a fair preponderance of the evidence that such a contract in substance as is alleged, was entered into. Upon that question I am asked to say that if you find from the evidence that previous to March 21, 1889, that plaintiff and defendant had correspondence by mail, and that defendant in a letter to and received by plaintiff, proposed to hire plaintiff to labor for him for a year at a stated price, and that plaintiff in a letter written to and received by defendant, accepted said proposal without condition or reserve. Then, I say to you that such a letter would constitute in law a written contract between plaintiff and defendant to labor for one year.

You will remember what the parties claim here. The claim of the defendant is—you will have them before you—that there was a written contract for services for one year. The plaintiff in reply says, that not

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all of that contract was in writing. You will ascertain what the proof was, and the burden of proof is as I have stated.

The question is now before you: What was the contract entered into, if any, by these parties?

If you find that there was a contract, find upon this issue for the defendant. Then, you will enquire further, was this contract disaffirmed or put an end to? You will remember the claim of the plaintiff is that he was a minor when this contract was entered into. If he was a minor this contract was voidable and he could put an end to this contract, although it was in writing. He says to you that when he went to work for this defendant, as he supposed to do ordinary farm labor, he was required to work late in the night and early in the morning; that he found the labor such that it was impossible for him to do it, and thereupon he informed the defendant and put an end to this contract; he disaffirmed it and told him he could work no longer under it. Thereupon the defendant asked him to go on, and then made, as he, the defendant, claims, substantially a new contract. In other words, from that time on he did not work under the contract as made, if you find there was one made, but that he worked independent of it. How is this, gentlemen? This is to be determined by the evidence in this case.

I say to you that the plaintiff had a right to disaffirm the contract if you find he was a minor, at any time before he became of age or up to the time or even at that time, he might disaffirm it and set it to one side. In this matter, the burden as I say, is upon the plaintiff to satisfy you by a fair preponderance of the evidence. These parties are at issue about it. The plaintiff insists by the evidence that he has given, that perhaps on more than one occasion before he became of age, and even, I think, at the time he became of age, he disaffirmed this contract, and said to this defendant that he must quit his services, and that the defendant thereupon requested him to go forward.

The claim of the plaintiff is that he did not go forward, if there was a contract; the claim of the defendant is that he did go forward under this contract and that he never did disaffirm it.

It would be a defense, if you find upon the evidence, that there was a written contract between the plaintiff and defendant made previous to March 21, 1889, by which plaintiff agreed to labor for defendant for one year, and that plaintiff commenced to labor for defendant under such contract on said March 21, 1889, and continued to labor for defendant under such contract until he quit on August 10, 1889, unless you should find that plaintiff disaffirmed the same before or about the time he became of age.

The other question made in reply in this case is that this defendant required of this plaintiff excessive labor—labor that was not required and was not contemplated within the terms of the contract, and that it was

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excessive beyond what reasonable men would require of their help, and therefore, he was justified in doing as he did. If you find that he did not disaffirm the contract, if one was made, he still claims that he was justified, under the circumstances, in quitting.

I say to you upon this subject, that if you find from the evidence that plaintiff was working for defendant on his farm under contract to work for a year, and at any time while so laboring worked hours in excess of a lawful day's labor, and did it voluntarily, without any compulsion on the part of the defendant, that would not in law alone constitute justification to quit his employment during the year.

You will remember that the plaintiff claims that it was not voluntary—that it was a requirement; it was something that the defendant asked of his employees. That is the claim of the plaintiff. The claim of the defendant is that whatever the plaintiff did was voluntarily done.

Now, then, gentlemen, it is a question for you to determine whether or not, under all the circumstances in the case as proved here, he was justified in quitting the employment of the defendant.

If you should find against the plaintiff upon these several matters set up in his reply, then, as I have said, and find that there was a contract, in the manner I have instructed you, then that would not only be a defense to the plaintiff's claim, but the defendant would be entitled to recover damages. He alleges in his cross-petition that he has sustained damages in the sum of thirty dollars. The rule of damages would be the difference between the contract price and what the market value of plaintiff's services were worth at that time.

On the other hand, if you find against the defendant on the contract as alleged in petition, then, the verdict would be for the plaintiff; the sum of \$70.00 with interest upon it up to the first day of the present term of court, February 10. Also, if you find he was a minor and disaffirmed the contract, the same rule would prevail, and for the plaintiff, or if you find he quit the employment without fault of the plaintiff and on account of the fault of the defendant, then your verdict would be for the plaintiff in the sum of \$70.00, it having been admitted that his services were worth that much in the answer, whatever these services were worth, with interest up to the first day of the present term of court, February 10, 1890.

Under the instructions I have given you, you will determine what the facts in this case are.

NEGLIGENCE—MASTER AND SERVANT.

[Columbiana Common Pleas, February Term, 1894.]

TIMOTHY CONNORS v. GOLDING & SONS COMPANY.*1. RULE AS TO INJURIES CAUSED BY ANOTHER EMPLOYEE.**

To recover in an action against the owners of a factory for personal injuries caused by the negligence of an employee, it is necessary to prove that he was the representative of the defendant for the time being at least and that he had authority to direct and control the plaintiff, but it is immaterial by what manner he was commissioned with such authority, whether by express direction or not.

2. FAILURE TO USE SAFETY APPLIANCES.

The fact that an employee in a factory, after being caught in a cylinder, did not use the devices for his safety, in the form of a rope or lever which would have stopped the cylinder, would not be such negligence as would prevent recovery, providing the defendant was guilty of negligence.

3. BURDEN OF PROOF.

The burden is on the plaintiff to show that the injury was caused by the negligence complained of, without regard to whether the defendant was negligent in other respects.

4. MEASURE OF DAMAGES.

The measure of damages in an action for personal injuries includes compensation for loss of time, physician's fees, reasonable expenses incurred to effect a cure, necessary expenses for nursing, an allowance for physical suffering or pain sustained and endured by reason of the injury and also compensation for loss of earnings by reason of the permanency of his injury.

Timothy Connors commenced an action in the court of common pleas of Columbiana county against The Golding & Sons Company, to recover damages for a personal injury. The Golding & Sons Company owned and operated a mill for grinding flint, for use in the manufacture of pottery, at East Liverpool, and Connors was an employee in the mill as "cylinder man."

The flint was ground by placing a charge in a horizontal cylinder, together with a quantity of hard pebbles. There was an opening in the side of the cylinder for putting in and withdrawing the charge. After the cylinder was charged this opening was closed by a head, which was

*Judgment affirmed by the circuit court, September term, 1894, and by the Supreme Court, 53 Ohio St., 647, unreported. In the Supreme Court, H. R. Hill, A. H. Clark, and J. A. Ambler, for plaintiff in error, cited: Little Miami R. R. Co. v. Stevens, 20 Ohio, 415; C. C. & C. R. R. Co. v. Keary, 3 Ohio St., 201, 202; Whaalan v. Mad River, etc., R. R. Co., 8 Ohio St., 249; P. Ft. W. & C. R. R. Co. v. Devinney, 17 Ohio St., 197; Berea Stone Co. v. Kraft, 31 Ohio St. 287; Railway Co. v. Ranney, 37 Ohio St., 665; P. Ft. W. & C. Ry. Co. v. Lewis, 33 Ohio St., 196; Sorenson v. Menasha Paper Co., 56 Wis., 338, 342; Gores v. Graff, 77 Wis., 174; Sherman v. Lumber Co., 77 Wis., 14, 22; Trapnell v. Red Oak, 76 Iowa, 744; Lehman v. Brooklyn, 29 Barb., 234; Payne v. Railroad Co., 40 New York Sup. Ct., 8; Stager v. Railway Co., 119 Pa. St., 70; Gores, Admr., v. Graff, 77 Wis., 174.—2 syllabus, and pp. 177, 180; 1 Shear. & Red. on Negligence (4 Ed.), Sec. 99 and notes.

P. M. Smith and R. W. Taylor, for defendant in error, cited: Street Railroad Co. v. Nolthenius, 40 Ohio St., 376-380; Western Union Telegraph Co. v. Wisden, 85 Texas, 201; S. C. 34 Am. St., 805.

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bolted in its place, so as to retain the charge in the cylinder while in process of reduction, and the cylinder was then started and rotated for some six hours, when it was stopped, with the head closing the opening on the upper side. The head was then removed and—if the charge was found to be reduced to proper condition—a screen was bolted in the opening, and by rotating the cylinder, the finely reduced flint was sifted out and the cylinder was ready for another charge.

There were six of these cylinders in the mill. They were driven by means of a large engine, the power being connected by means of a line shaft driven by the engine on which pulleys were placed at proper positions which were connected by belts with pulleys on the shafts of the several cylinders; so that either of the cylinders could be stopped, discharged, charged again and started, independent of the others, and without the engineer's notice or a change of engine speed.

The cylinders were raised above the general floor of the mill some ten feet, and were enclosed in boxes built separately around each, and there was a platform above the level of the cylinders, for the purpose of reaching the machinery and cylinders; over the middle of each cylinder there was an opening with a door to close the same when not necessarily open, and through this opening the cylinders were charged, the manhead put on, taken off, etc.

The mode of removing the manhead was for the cylinder man to stop the motion of the cylinder by throwing the belt, by means of a lever, from the pulley which operated the cylinder to a loose pulley on the shaft; he then opened the door in the platform, stepped down on the standing cylinder, removed the manhead, put in the screen, and returning to the platform started the cylinder in motion so as to screen out the reduced charge.

The lever used to throw the belt on and off, to start and stop the cylinder, was extended below the platform, so that the cylinder might, when necessary, be started, or stopped, from below.

Charge to the Jury.

BILLINGSLEY, J.

Gentlemen of the Jury: You should approach the consideration of this case with your minds absolutely free from prejudice against or sympathy for either of the parties, the plaintiff or defendant. It is the imperative duty of the jury to consider this case and decide it precisely the same as you would if it was a suit between two individuals, and the fact that the plaintiff is an individual and the defendant is a corporation should make no difference to you whatever.

In considering and deciding this case, you should look solely to the evidence for the facts, and to the charge of the court for the law of the case, and find your verdict accordingly without reference to who is

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plaintiff or who is defendant. It is improper for counsel in the argument of the case to state any matter or thing bearing upon the questions of fact, and claimed to be within his personal knowledge, or which may have been stated to him by others not appearing as witnesses in the case, or which has not been mentioned in the evidence in the case, and it will be your duty to disregard all such statements, and to arrive at your verdict upon the evidence actually given in the case, without placing any reliance upon, or giving credit to, statements of counsel not supported by evidence.

The plaintiff claims that, by reason of the injuries of the defendant, he has received a personal injury, and brings this suit to recover damages from the defendant for such injury. In his petition filed in this case, the plaintiff states that he was employed by the defendant to perform the duty of charging and discharging cylinders, used by the defendant in its flint mill for the purpose of grinding flint; that in discharging and recharging such cylinders it was the plaintiff's duty to disconnect such cylinders from the machinery which propelled it, and to have it remain disconnected while he was discharging and recharging the cylinder; and that while plaintiff was engaged in discharging one of the cylinders in defendant's mill, and while he was standing on that cylinder where it was necessary for him to be for that purpose, one Benjamin Wilkinson, who, plaintiff claims, was then in charge of defendant's works, and having the entire management thereof, and the supervision of plaintiff and other employees, with full authority and power from the defendant to control and direct the plaintiff and other employees of the defendant, without any notice to the plaintiff, and without making any effort to ascertain the whereabouts of plaintiff, and well knowing the manner in which it was necessary for plaintiff to perform the work aforesaid, and knowing the dangerous nature thereof, and knowing it was about the time when said cylinder should be emptied and recharged, threw the belt on the pulley on one of said cylinders on which the plaintiff was then standing, and thereby caused the same to revolve rapidly, and draw the body of the plaintiff between said cylinder and the frame surrounding the same, thereby crushing, bruising and mangling the body of plaintiff so as to break his leg in two places, crush the ankle thereof, break his collar bone, and thereby bruised, cut, and sprained his back and otherwise caused the plaintiff serious bodily injury, causing him to suffer great pain, and incapacitating him for labor, and permanently disabling him; by reason of which he has incurred large expense in securing medical and other attendance, to the damage of the plaintiff in the sum of ten thousand dollars.

To this petition the defendant has filed its answer, which contains three defenses. By the first, the defendant denies each and all the allegations contained in the plaintiff's petition, and in the second defense,

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the defendant claims that, at the time of the alleged injuries to the plaintiff, if such injuries were received, the plaintiff had exclusive charge and control of the cylinders and the department of the works of the defendant in which the cylinders were placed, and that no one had anything whatever to do with the management of said cylinders except the plaintiff, and that, if any accident occurred resulting in the serious injuries complained of by the plaintiff, it was by virtue of plaintiff's own fault and carelessness, in negligently attending to his own duties, and by not properly using the means in his hands and provided by the defendant for the plaintiff's safety in operating said cylinders, in this: that each cylinder can be run and stopped independently of any others; that the engine is run steadily night and day, but by means of levers any one of the cylinders can be stopped when required without interfering with the engine or other cylinders or machinery; that, as a means of safety, there is a rope attachment which, when thrown over the levers used for the purpose of disconnecting the cylinders from the machinery, prevents the starting or putting in motion of the cylinders until the one is charged and the lever released by removing said rope and pulling the lever in the opposite direction; that this lever and rope, as safety attachments, were on the cylinder in charge of plaintiff at the time that the accident complained of occurred, and that the defendant carelessly and negligently neglected to put the rope in its proper place, and over the lever, so as to prevent the starting of the cylinder until after he had removed the man-head and placed the screen-opening on the cylinder for the purpose of emptying the same; all of which the defendant says was the duty of the plaintiff to do, and that the injuries, if any, received by the plaintiff, were due to the plaintiff's carelessness in this respect.

By the third defense, the defendant denies that Benjamin Wilkinson was in charge of said work, and denies that he had any management thereof, but says on the contrary the said Wilkinson was, at the time when the plaintiff claims to have received the injuries mentioned in the petition, employed by the defendant to run the engine, oil the machinery, and keep the belts in order, and nothing more; and that he had no control over the plaintiff or over the department in which the plaintiff had sole charge of the cylinders, and that if said Wilkinson did throw the belt on the pulley of the cylinder, causing the same to revolve rapidly, as alleged in plaintiff's petition, the said engineer acted upon his own responsibility, and without the consent and direction, and against the positive instructions of the defendant.

To this answer the plaintiff has filed a reply, in which he denies all the material allegations contained in this answer. In brief, then, in the petition the plaintiff claims he received the injury he complains of, by reason of the negligence of the defendant, and without any fault on the part of the plaintiff. And the defendant claims that, if the plaintiff re-

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ceived an injury, he received it by reason of his own negligence, or that his negligence contributed to the injury, or that if the injury was caused in any degree by the negligence of Benjamin Wilkinson, said Wilkinson was a fellow-servant of the plaintiff, for whose negligence as fellow-servant the defendant would not be liable.

These pleadings, the plaintiff's petition, the defendant's answer and the plaintiff's reply thereto, make up what are called the issues or questions between the parties to the case.

By them the plaintiff asserts certain facts to be true, and the defendant says they are not true. This casts upon the plaintiff the burden of establishing by a preponderance of the evidence, that the plaintiff received an injury while in the employ of the defendant, through the negligence of the defendant, and without any fault of the plaintiff.

In civil actions, facts or propositions are not required to be established beyond a reasonable doubt, nor are they required to be clearly proven. It is only required that they be established by a preponderance of the evidence.

By a preponderance of the evidence is meant the greater weight of evidence. A proposition is said to be established by a preponderance of the evidence when there is a greater weight of evidence in favor of than against it. If, when weighed and considered, the evidence is found to be exactly evenly balanced, the party on whom rests the burden of proof must fail; but if the weight of evidence is found to preponderate in his favor, no matter how slight the preponderance, then the matter should be decided in his favor. A preponderance of the evidence in the case is not alone to be determined by the number of witnesss testifying to a particular fact, or state of facts. In determining on which side the preponderance of the evidence is, the jury should take into consideration the opportunities of the several witnesses for seeing and knowing the things about which they testify, their conduct and demeanor while testifying, their interest or absence of interest, if any, in the result of the suit, the probability or improbability of the truth of their several statements, in view of the evidence, facts, and circumstances proven at the trial, and from all these circumstances determine upon which side is the weight or preponderance of the evidence.

According to these rules and instructions, you will proceed to determine the questions between the parties in the case, and I shall now give them to you.

First: Did the plaintiff, while in the employ of the defendant, receive a personal injury?

Second: Did he receive such injury by reason of the negligence of the defendant?

Third: If the plaintiff did receive a personal injury by reason of the defendant's negligence, was the plaintiff himself free from negligence?

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I will now call your attention to these propositions more particularly, and in the order in which I have just stated them.

First: Did the plaintiff, while in the employ of the defendant, receive the personal injury which he complains of? As to this proposition you will look solely to the evidence. I can say but little that will aid you in determining that.

Second: If he did receive such injury, was it by reason of the negligence of the defendant? This proposition involves several questions. In the first place it is necessary for you to understand what is meant by negligence. And I say to you that, generally, negligence is the failure of the party to exercise that degree of care which men of common prudence usually and ordinarily exercise under the same or like circumstances.

Now, on the question as to whether or not there was negligence on behalf of the defendant, it is necessary for the plaintiff to show, by a preponderance of the evidence, that Benjamin Wilkinson did the act which caused the plaintiff's injury. That is, it is necessary for the plaintiff to show, by a preponderance of the evidence, that Benjamin Wilkinson started this cylinder in motion, and that by starting it he caused the injury to the plaintiff of which he complains. It is not only necessary to show that Wilkinson started the machine, but it is necessary for the plaintiff to show that he did it negligently; that in doing it he did not exercise that care and caution which men of common prudence would ordinarily exercise in respect to that matter, under the same or like circumstances. Now you will look to the testimony and all the facts and circumstances, and if you find, by a preponderance of the evidence, that Benjamin Wilkinson did set this cylinder in motion, and thereby caused the injury to the plaintiff, then you should consider whether or not he did it negligently; that is, whether or not he exercised that degree of care that a prudent man would ordinarily exercise under those or similar circumstances.

But this is not all. In order to charge the defendant with such negligence, if you find that Wilkinson did this and did it negligently, and that such negligence caused plaintiff's injury, you must further find that he was, for the time being at least, the representative of the owners or operators of this factory, that he had some power or authority or control over the plaintiff in connection with the work which the plaintiff was then engaged in. In order to be the representative of the defendant, he must have had authority to direct and control the plaintiff in manner of doing the work in which the plaintiff was then engaged. The plaintiff in the performance of his duties must have been subject to the orders and direction of the said Wilkinson, must have had some control and authority over the plaintiff. If Wilkinson did not have such power and control and authority to direct the plaintiff in the management of his work, the

plaintiff and Wilkinson would be fellow-servants, and the defendant would not be liable to the plaintiff for the injury occasioned to him by the negligence of the fellow-servant. I say to you that Wilkinson must have had some authority, some control, over the defendant. It is immaterial by what manner he was commissioned with such authority if he in fact did have it. It is unnecessary that there should have been any express direction or instruction from some one in authority in order to constitute the man Wilkinson the representative of the defendant.

It would be sufficient if the manager or the vice-president, or some one who is conceded to be the authorized representative of the defendant, recognized Wilkinson as having authority and acquiesced in his management and control of the plaintiff, and regarded him as being in control of the plaintiff, and having authority to direct the plaintiff.

Now if Wilkinson did not represent the defendant, did not have control over the plaintiff, did not have authority to direct him in his employment, then the plaintiff and Wilkinson would be fellow-servants, and the plaintiff could not recover, notwithstanding the injury may have been caused by the negligence of Wilkinson, and in that event your verdict should be for the defendant.

But if you find on this proposition in favor of the plaintiff; that is, if you find that the defendant was guilty of negligence under the instructions which I have given you, and that such negligence caused the injury to the plaintiff then you will look to the testimony to see, whether or not the plaintiff was free from negligence.

The law imposes upon the plaintiff the duty to exercise care for his own safety, for if the plaintiff himself was guilty of negligence, which in any way contributed toward the injury; that is, assisted in the bringing it about, the plaintiff cannot recover, unless Wilkinson, after he became aware, or ought to have become aware of the plaintiff's danger, failed to use ordinary care to avoid injuring the plaintiff. If, as the defendant claims, the plaintiff did not use the devices for his safety which the defendant claims had been provided for that purpose; that is, if the plaintiff did not use the strap or rope, if you find there was a strap or rope there for the purpose of guarding the lever, such omission on the part of the plaintiff would not be such negligence on his part as would prevent his recovery provided you find that the defendant was guilty of negligence, and provided further that you find that Wilkinson in the exercise of such care as a reasonable man would ordinarily exercise under such circumstances, might have seen and known that the plaintiff was upon this cylinder engaged in the discharging of it at the time he started the cylinder, if he did start it.

In order to recover in this action, as I have already said, it devolves upon the plaintiff to show, by a preponderance of the evidence, that the defendant was negligent in the respects complained of, to which I have

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called your attention, and he must further show that the negligence complained of was the sole cause of his injury, and that it was not caused in part by the negligence of the plaintiff himself. I desire to call your attention to the fact that I have said that the negligence must be the negligence complained of in the petition. It is immaterial whether or not the defendant was negligent in other respects.

In order to recover in this action, it must appear that the defendant was negligent in the respects of which the plaintiff complains in his petition. Unless the plaintiff has established each and all of these propositions to which I have called your attention, your verdict should be for the defendant. But if you find that the plaintiff has established all these propositions to which I have called your attention as being essential to the right to recover, your verdict should be for the plaintiff; and it will then be necessary for you to consider and determine the amount of damages the plaintiff should recover, by your verdict; and if you find he is entitled to recover, you should allow him such sum as will fairly compensate him for the injury which he has received, and this would include the loss of time, taking into consideration what the testimony may show as to the value of his services, and the value of his time, also take into consideration his physician's fees. Whatever sum he has expended, if any, or whatever debt he has properly incurred in order to effect a cure, should be considered and whatever amount is reasonable for that should be allowed. Also any necessary expenses incurred in the way of nursing in order to properly care for his injuries; and you should also look to see what, if any, physical suffering or pain he may have sustained and endured by reason of such injury. Take all these into consideration, and make such fair allowance for them as in your judgment you may think right and proper. The amount should be reasonable.

You should look to the evidence and see whether or not the injuries which he may have sustained as likely to be permanent or not, and, if permanent, make such allowance as is right and proper under all the circumstances, taking into account what the evidence may show as to his probable earnings, if anything, and allow him as much as in your judgment will be right and proper, and thus fairly and reasonably compensate him for the injury he has sustained.

When you retire to your room, you will appoint one of your number foreman, and, when you have agreed upon a verdict, you will reduce it to writing, and have your foreman sign it as foreman, and then return into court with it.

You may now retire.

The defendant, at the time, excepted to the court's charge to the jury, as follows:

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1. To that part of the charge relating to the authority which Wilkinson had which constituted him the agent of the defendant so as to bind the defendant by his acts.

2. As to contributory negligence on the part of the plaintiff, especially where it relates to the use of the devices for his safety.

3. To the part of the charge relating to the fact, that even though the plaintiff did contribute to his injury by his own negligence in not using these devices, if the defendant was also negligent through the man Wilkinson, plaintiff could recover.

Whereupon the jury retired for deliberation, and returned a verdict for the plaintiff.

DEEDS—DURESS.

[Cuyahoga Common Pleas, April Term, 1888.]

*MINNIE E. WHELOCK V. COMMERCIAL NATIONAL BANK.

1. CONTRACTS BASED UPON ILLEGAL TRANSACTIONS.

Where a contract based upon an illegal transaction has been executed the court will not rescind it nor give relief against its terms; and where it is executory it will not enforce it.

2. PARI DELICTO—POSITION UNEQUAL.

Where the condition or position of two contracting parties is glaringly unequal, and the mind of one is overborne by the other, they are not on an equality of guilt, and the rule of *part delicto* will not apply.

3. CONTRACT FOR SUPPRESSION OF CRIMINAL PROCEEDING.

A contract based upon suppression of criminal proceedings is illegal and parties entering into it for that purpose are in *part delicto*, and neither can have relief against the other.

4. RULES APPLIED.

The voluntary execution by plaintiff of a deed of her lands to the holder of paper forged by her husband and father and brother, for the purpose of stifling a criminal prosecution against them, is not duress for which the conveyance will be set aside where it appears that the conveyance was made by procurement of the wife, under advice of counsel and upon due deliberation and without extortion upon the part of the holder of the forged paper.

*Judgment reversed by the circuit court, October term, 1890, and judgment of the circuit court reversed by the Supreme Court and judgment of the common pleas affirmed, 52 Ohio St., 534, unreported. In the Supreme Court, Jas. H. Hoyt, A. St. J. Newberry, and A. C. Dustin, for plaintiff in error cited: Roll v. Raguet, 4 Ohio, 400, 420; Goudy v. Gebhart, 1 Ohio St., 262; Hooker v. DePales, 28 Ohio St., 251; Kahn v. Walton, 46 Ohio St., 195; 8 Am. and Eng. Ency. Law, 649; 5 Am. and Eng. Ency. Law, 430; 3 Am. and Eng. Ency. Law, p. 933; Terrill v. Auchauer, 14 Ohio St., 80, 85; Allis v. Billings, 6 Metcalf, 417; Anderson v. Roberts, 18 J. R., p. 529; Story on Contracts, Sec. 405; Devlin on Deeds, par. 81; Knapp v. Thomas, 39 Ohio St., 377, 388; Reece v. Allen, 5 Gilman, (Ill.), 241; Frauchet v. Leach, 5 Cowen, 508; Williams v. Mears, 2 Dian., 608; Bigelow on Fraud, Vol. 1 (Edition of 1888), p. 73; George v. Tate, 102 U. S., 564, 570; Hartshorn v. Day, 60 U. S. (19 Howard), 223; Strong v. Strong, 102 N. Y., 69; Bowen v. Mandeville, 95 N. Y., 237; Moller v. Tuskey, 87 N. Y., 166; Benj. on Sales, Secs. 648, et al.; Doane v. Lockwood, 115 Ill., 490; Brewer v. Goodyear et al., 88 Ind., 572; Talcott v. Henderson, 31 Ohio St., 162; Secs. 4198 and 4106, Rev. Stat.; Lindsley v. Coats, 1 Ohio, 243, 245; Baldwin v. Bank, 1 Ohio St., 142, 148; Spangler v. Dukes, 39 Ohio St., 642; Starr v. Starr, 1 Ohio, 321, 327; Bigelow on Fraud, pp. 76-77; Starr v. Starr, 1 Ohio, 321, 327; Spangler

Wheelock v. Bank.

On December 19, 1883, Minnie E. Wheelock, together with her husband, executed a warranty deed of certain premises on Perry street, in the city of Cleveland, Ohio, to the Commercial National Bank, of Cleveland, Ohio, and subsequently on December 28, 1883, the said deed was delivered to the bank. The bank took possession of the premises on that date, and has ever since been the owner of, and in possession of, the said premises.

On April 8, 1885, nearly two years after the deed was executed, Minnie E. Wheelock filed her petition in the common pleas court. In substance, the allegations of the petition are that the bank in the fall of 1883 was in possession of about \$15,000 of drafts of the Cleveland Chair Company, a corporation of which C. S. Wheelock, the husband of Minnie E. Wheelock, B. J. Wheelock and E. D. Wheelock, the father and brother respectively of C. S. Wheelock, were the officers and managers; that a part of the paper so owned by the bank was claimed to be forged by the three Wheelocks, and that the bank had caused them to be arrested for forgery, and imprisoned until they were released upon bail. This arrest is alleged to have taken place about the middle of October, 1883. That the bank caused publication to be made in the public press of the arrest of the said three Wheelocks, and great pressure brought to bear upon them and upon the said Minnie E. Wheelock in order to compel her to convey the property mentioned to the bank, so that she was deprived of her free will, and that the title to her property was obtained by the bank without consideration and against her will.

She further alleges that she was under duress at the time she gave this deed, and she sought, in her petition, to have the court decree that

v. Dukes, 39 Ohio St., 642; Truman v. Lore, 14 Ohio St., 144; Knapp v. Thomas, 39 Ohio St., 377, 388; Walker v. Kynett, 32 Iowa, 524; Feret v. Hill, 15 C. B., 207; Hartshorn v. Day, 60 U. S. (19 How.), 223; Williams v. Mears, 2 Disc., 604; 8 Am. and Eng. Ency. Law, p. 651; In re Dixson v. Caldwell, 15 Ohio St., 412, 415; Pomeroy's Remedies and Remedial Rights, Sec. 68; Hager v. Reed, 11 Ohio St., 626, 635; Klonne v. Bradstreet, 7 Ohio St., 323-326; Rankin v. Hannan, 37 Ohio St., 113, 118; 6 Am. and Eng. Ency. Law, p. 245; Wallace v. Seymour & Rennick, 7 Ohio, 158; Truman v. Lore, 14 Ohio St., 144; Walker v. Kynett, 32 Iowa, 526; Spencer v. Marckel, 2 Ohio, 263, 264; Smith's Lessee v. Hunt, 13 Ohio, 260, 268; 2 Yapple Code Practice and Precedents, p. 1; Rowe v. Beckett, 30 Ind., 154; Groves v. Marks, 32 Ind., 319; Peck, Trustee, etc., v. Newton, 46 Barbour, 173; Lombard v. Cowham, 34 Wis., 486; Clark v. Lockwood, 21 Cal., 222; Emeric v. Penniman, 26 Cal., 119; Kahn v. Old Telegraph Mining Co., 2 Utah, 195; Gibson v. Chouteau, 80 U. S. (13 Wall.), 103; Goepinger v. Ringland, 62 Iowa, 76; Kerr on Fraud and Mistake, pp. 44-50; Rowland v. Entrekin, 27 Ohio State, 47, 49; Admr. of John Reed v. Reed, 25 Ohio St., 422; Ivinson v. Hutton, 98 U. S., 79; Reid v. Burns, 13 Ohio St., 49, 59; Rowland v. Entrekin, 27 Ohio St., 47; Massie v. Stradford, 17 Ohio St., 597; Buckner v. Mear, 26 Ohio St., 514; Rankins v. Hannan, 37 Ohio St., 113; Sheeful v. Murty, 30 Ohio St., 50; Dodsworth v. Hopple, 33 Ohio St., 16; Truman v. Lore, 14 Ohio St., 144; Kent's Commentaries, Vol. 2, 13th Edition, p. 234; Tyler on Infancy, p. 43, *et seq.*; also pp. 51-2; Story's Equity Jurisprudence, 13th Ed., Vol. 1, Sec. 24; McVeigh v. Ritenour, 40 O. S., 107; Corry v. Gaynor, 21 Ohio St., 277, 280; Reed's Administrator v. Reed, 25 Ohio St., 424; Moore v. Chittenden, 39 Ohio St., 563; Moore v. Adams, 8 Ohio, 373, 375; Herbst v. Manss, 8 Dec. (Re.) 215; Roll v. Raguet, 4 Ohio, 400, 420; Goudy v. Gebhardt, 1 O. S., 262; Hooker v. DePalos, 28 O. S., 251; Kahu v. Walton, 46 O. S., 195; Moore v. Adams, 8

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the said bank should reconvey to her her title to the property in fee simple, by a short day to be named, and that, in default of such conveyance, the decree of the court operate as such conveyance, and she also sought an accounting of the rents and profits during the time the bank was in possession.

A motion was filed by the defendant, the bank, and a large portion of the allegations of the petition stricken out.

On June 20, 1887, more than two years after the suit was begun the plaintiff filed an amended petition. In her amended petition, she omitted the parts stricken out by the court on motion, from the original petition, but in other respects, the two petitions were substantially the same, although the order in which the allegations were stated in the two petitions was not in all respects alike. After stating, in her amended petition, the facts fully and completely, as claimed by her, and substantially as stated in her original petition, she closed her first cause of action of the amended petition in the following words:

"And she avers that by reason of the matters and things above set forth, said deed was and is null and void, and she insists that the same shall be so treated; and she avers that she is the owner in fee simple of said premises, and has a legal estate therein, and is entitled to the possession thereof, and that the defendant unlawfully keeps her out of the possession thereof."

In a second cause of action in her amended petition, she alleges that the bank has retained possession of the premises and received the rents and profits thereof, and that she believed that they amounted to \$500 per year over and above the taxes paid on the premises.

Ohio, 373; Haines v. Rudd, 102 N. Y., 372; Smith v. Rowley, 66 Barb., 502; Watkins v. Baird, 4 Am. Dec., 170; Meek v. Atkinson, 19 Am. Dec., 653; Hatter v. Greenlee, 26 Am. Dec., 370; Devlin on Deeds, pp. 81-82; Yeoman, v. Lasley, 40 Ohio St., 190; Baldwin v. Snowden, 11 Ohio St., 203.

Prentiss and Vorce, for defendant in error, cited: 8 Am. and Eng. Law, 649; Gunsallus v. Pettit, 46 Ohio St., 27; Stat. Sec. 5130; Calvino v. State, 12 Ohio St., 60, 72; Ad. Cont., 732 (bottom page); Chitty on Cont., 597 (Ed. of 1851); U. S. v. Grossmayer, 76 U. S. (9 Wall.), 72; 19 Am. Dec., 71; Terrill v. Achauer, 14 Ohio St., 80, 85; 44 Pa. St., 12-3; 2 Pet. Sup. Ct., 539; 2 Story E. J. Sec. 695; 1 Story, E. J., Sec. 298; Cox v. Donnelly, 34 Ark., 766; Burgett v. Burgett, 1 Ohio, 469; Anderson's Dic. of Law, 387; Story Cont. Sec. 394; 3 N. H., 508, 511; 5 Hill, 158; 74 U. S. (7 Wall.), 215; Whar. Cont., Sec. 151; Bishop Cont., Sec. 721; 26 Barb., 122; 6 Wis., 54, and 14 Cox's Crim. L. Ca. 617-8, 623; Fribley v. State, 42 Ohio St., 205; 18 John, 515; Nash v. Atherton, 10 Ohio, 163; Webb's Admir. v. Roff, 9 Ohio St., 430-4; McVeigh v. Ritenour, 40 Ohio St., 107-8; Truman v. Lore, 14 Ohio St., 144; p. 155 (near the top of the page); Williams v. Mears, 2 D'sn., 604, 608; 17 New York, 270; 13 Mass., 177-8; 100 Mass., 355; 5 Allen 59-60; 7 Cush., 181-183; 13 Pa. St., 359-360; 92 Pa. St., 171; 100 Pa. St., 51-52; 56 Ill., 25, 27; 77 Ala., 290; 57 Wis., 288-289, 290-291; Ellis v. Davis, 109 U. S., 485; Dick v. Railroad Co., 38 Ohio St., 389; Dev. on Deeds, Sec. 83; Blair v. Coffman, 5 Am. Dec., 659; 26 Am. Dec., 376, note; 14 New York, 123; 11 Mass., 379; 18 Mass., 371; Truman v. Lore, 14 Ohio St., 144, 151; 3 Am. and Eng. Law, 933, note 2; 17 Am. and Eng. Law, 406; 22 Pick., 181; Hooker v. DePalos, 28 Ohio St., 251, 260; 107 N. Y., 111; 102 New York, 272; 26 N. Y., 12; 14 R. I., 618-620; 131 Mass., 51, 55; Bailey v. Williams, 4 Gifford, 638, 645; 1 Law Rep. E. & L. App., 200; Law Reports, 8 Ch. Div., 473-474, 477; 11 Vermont, 252; 13 Ves. Jr., 581; 151 Pa. St., 594.

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The prayer to the amended petition was in the following words:

"The plaintiff asks for judgment against the defendant for possession of said premises, and for the amount of said rents and profits, and the interest thereon from the time the same were so received."

The bank answered the amended petition, stating in substance that the Cleveland Chair Company, in the fall of 1883, failed in business, being indebted to the bank in the sum of about \$15,000 as the result of the discount by the bank for the chair company of drafts drawn on various parties by the chair company; that the acceptances on a large part of the drafts that were discounted were forged by the three Wheclocks, who were the managers, officers and stockholders of the chair company; that upon the discovery of the forgery, the officers of the bank placed some of the forged paper in the hands of the county prosecutor of Cuyahoga county, Ohio, who presented the evidence to the grand jury, who returned an indictment against the three Wheclocks for forgery; that J. E. Ingersoll, an attorney at law, representing the Wheclocks, offered to pay the debt to the bank by a conveyance to the bank of the property described in plaintiff's petition, together with some other property; that the bank accepted Ingersoll's proposition, and received the conveyance mentioned, in the plaintiff's petition, and surrendered up to Ingersoll all the notes and drafts held by the bank, both those forged and those that were genuine.

The answer also alleged that the three Wheclocks admitted to the bank that they were guilty of the crime of forging said acceptances.

A reply was filed to this answer in which the guilt of the three Wheclocks is not denied.

Before the case came to trial, a motion was made by Minnie E. Wheclock, to have the case assigned for trial by jury. This motion was overruled, and the case was assigned to be tried by the court, without a jury. At the time of the trial, the application for a jury trial being renewed, was denied by the court, and the case was tried to the court without a jury.

The evidence presented by the plaintiff in substance disclosed that in October, 1883, there was an indebtedness of the chair company to the bank of about \$15,000; that B. J. Wheclock, E. D. Wheclock and C. S. Wheclock were the stockholders and officers, and had the entire ownership and control of the chair company.

That the chair company failed about this time and on investigation, it was found that the three Wheclocks had, for several years, been carrying on a system of fraud, it being their custom to draw a bill of exchange payable by some fictitious person to themselves, and accept the bill in such fictitious name. These drafts were made for odd amounts, as if in payment for invoices of goods, and were discounted at the bank as if genuine business paper. When these bills became due, it was the cus-

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tom of the Wheelocks to forward money to pay them to the bank where they were made payable, obtaining funds for the purpose to such remittance, by discounting other forged paper with the bank. After the failure of the chair company and the discovery of the fraud, the bank presented some of this paper to the prosecuting attorney of the county, who fully investigated the facts, and the three Wheelocks were indicted by the grand jury for forgery on October 13, 1883, and immediately thereafter arrested. Immediately after the arrest, every possible effort was made by the Wheelocks, and their relatives and their friends, and Judge Ingersoll, their attorney, to escape from the consequences of their crime. Judge Ingersoll stated to the president of the bank, shortly after the arrest, that he had advised his clients that it was an honest debt, and that it should be paid. The guilt of the Wheelocks was not denied in the pleadings and was clearly shown on the trial.

The plaintiff, Minnie E. Wheelock, testified that she called upon the president of the bank at his residence, and that he told her there that if the debt was paid, the prosecution would be stopped, but if the debt was not paid, the prosecution would go on. About a month after this interview between the plaintiff and the president of the bank, to-wit, on November 15, 1883, the plaintiff's father conveyed to her the house and lot on Perry street, which she in turn, more than a month afterwards, conveyed to the bank, the deed therefor being drawn by Mr. Prentiss, her attorney in this case, and acknowledged before his partner, Mr. Vorce. On December 28, 1883, Judge Ingersoll having arranged a settlement of the debt to the bank delivered this deed, with certain other securities, to the bank in payment of said debt and the bank delivered up to Judge Ingersoll all the evidences of debt of the chair company, both the drafts which were forged, and the drafts which were genuine.

Subsequently, at the request of Judge Ingersoll, the vice-president of the bank wrote a letter to the county prosecutor, in which he stated that the bank would prefer that the prosecution should not be pressed, and the prosecution was thereafter nolled.

Immediately thereafter, the plaintiff and her husband left the city of Cleveland, and made no objection to the conveyance until the bringing of this suit, which was about two years after the delivery of the deed.

The plaintiff stated on the trial that her only object in executing this deed to the bank was to save her husband from imprisonment.

At the termination of the plaintiff's evidence, a motion was made by defendant to dismiss the case on the ground that the plaintiff showed an executed contract made for an illegal purpose. On the hearing of this motion, the plaintiff admitted that this contract was for an illegal purpose and was executed, but claimed that it was made under duress, and that consequently, the rule of *pari delicto* did not apply.

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The court of common pleas granted the motion and dismissed the case.

NOBLE, J.

The object of this suit is to set aside a deed obtained, as is alleged, by duress, that duress being a criminal prosecution against the plaintiff's husband, her father-in-law and brother-in-law, in the first place instituted or thereafter made use of by the bank to obtain the deed. As to the principles of law governing such cases, our Supreme Court has held that where a contract based upon an illegal transaction has been executed the court will not rescind it or give relief against its terms, and that where it is executory it will not enforce it.

It is further well settled that a contract based upon the suppression of criminal proceedings is illegal, and that parties to it entering into it for that purpose are in *pari delicto*, and neither can have relief against the other.

For the purposes of this motion, as the court looks at the testimony, it may also be conceded, as claimed by the plaintiff, that where the condition or the position of the two contracting parties is glaringly unequal, and the mind of the one is overborne by the other, they are not on an equality of guilt, and the rule of *pari delicto* will not apply, and the weak will be protected against the strong and the wrong done made right.

It is also settled that the effect of unlawful duress is to vitiate all contracts it enters into unless in some way the effect is afterwards waived. As to imprisonment being duress, it has expressly been held by our Supreme Court that to constitute such duress as will avoid a contract, it must be unlawful, that the party was innocent of the crime charged.

The testimony on the part of the plaintiff shows an admitted forgery by plaintiff's husband, and father and brother, whereby the bank was the loser to the amount of about ten thousand dollars; an indictment against all three found by the grand jury of this county; the information which led to it being first communicated to the prosecuting attorney by one of the officers of the bank; an interview solicited by Judge Ingersoll between the president of the bank and himself, he representing at first E. D. Wheclock, and subsequently the plaintiff's husband and B. J. Wheclock as well, in which the president of the bank expressly says to him in the outset that they cannot make any agreement whereby the criminal proceedings will be suppressed, and wherein Judge Ingersoll expressly says that his talk in no way relates to that; that he had told his clients it was an honest debt and should be paid; that he had been employed to look after their interests in a criminal prosecution, and that the first thing to do was to pay up the bank; that he had a great many interviews with the bank officers in regard to it, and that as a final result the debt, amounting to \$15,000, about \$10,000 of which was forged paper, was paid in part and the balance secured, a part of the payment being the deed in contro-

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versy, and that after this was accomplished, the evidences of debt, including the forged paper, were delivered to him, and that at his request a note was written by the cashier to the prosecuting attorney saying that they would prefer that the criminal proceedings be stopped. In the meantime, soon after the arrest, which was October 13, 1883, the plaintiff called upon Mr. Eells, the president of the bank, at his house, and she states that she asked him if the debt was paid whether the criminal prosecutions would proceed, to which he replied "no." That she then asked him if it was not paid whether they would proceed, to which he replied, "yes." She testifies that this was repeated; she testifies further that she subsequently made the deed solely to save her husband from his possible imprisonment under the criminal prosecution and for no other reason.

Miss Winters testifies to seeing the plaintiff subsequently, and that she was very much agitated, and that she did not think her capable of transacting business, identifying particularly one night when she said Mrs. Wheelock told her her husband had gone to see her father in regard to doing something to relieve him from the criminal prosecution; that her agitation was great and that some other woman would not have been affected so much and that she feared the result of the prosecution.

B. J. Wheelock testified to certain talks with Mr. Eells, looking to a dismissal of the criminal prosecutions, and that these talks were all with that end in view.

T. D. Wheelock testified that on one occasion Mr. Eells said "you are not going to stand trial are you?" The evidence all goes to show, in the opinion of the court, that the only purpose on the part of Mrs. Wheelock and of her husband and father-in-law and brother-in-law, in all that was done by each and all of them was to stifle their criminal prosecution, and it is fairly inferable from the testimony that the bank was willing to stifle it, provided it got its money. The advances are all made by the Wheelocks, or their attorney; the propositions are all made by them. Now, was that a lawful purpose or not? Certainly not. The end sought was accomplished. Was it by their procurement as well as by that of the bank? It seems to the court that there can be but one answer, that it was. Whether it was accomplished by the aid and concurrence of the bank or not, can make no difference.

How can the effect of Mrs. Wheelock's plain statement that the only purpose of making the deed was to save her husband from the possible imprisonment under the criminal proceedings—how can that, I say, be overcome? The effect of that statement must be, under the law, to give her no relief, but to leave her where she has placed herself, unless at the time when she made the deed her understanding and mind was so unbalanced and overreached by acts directly attributable to the bank, and done by the bank with the express purpose of overreaching and overaw-

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ing and terrorizing her, and thus take her actions out of the operation of the rule *pari delicto*. If such were the facts they might, perhaps, under some of the decisions, amount to duress and would avoid her act. It cannot be claimed that there is any testimony tending to show that the purpose of the bank in instituting these proceedings was for the purpose of extorting the settlement. It is claimed, however, that after they were instituted the bank used them for that purpose. If immediately upon her interview with Mr. Eells, or within a short time thereafter, and with his declarations that if the debt was not paid the prosecution would go on, she had executed and delivered this deed, the court would be strongly inclined to believe that such a declaration on his part had the effect claimed for it to a great extent; but the testimony shows that this interview was shortly after the arrest, which was October 13, when she had no property to convey. The deed to her from her father was November 15, about a month probably after; and although there is no testimony as to the date of the deed from her to the bank, there is testimony showing that Judge Ingersoll delivered this deed to the bank about the middle of December, fully a month after she received title to the property and about two months after the interview with Mr. Eells. Now what was being done in the meantime? She says she consulted with no one about making this deed. It is contrary to all human experience that a wife, under the circumstances named, should have no knowledge of or consultation in regard to the progress of events from the time of the interview with Mr. Eells in October up to the middle of December. B. J. Wheclock knew about the contemplated conveyance and talked with Mr. Eells about it. E. D. Wheclock knew about it and talked with Mr. Eells, and Judge Ingersoll knew about it and canvassed the making of it and the value of the property conveyed by it frequently with the bank officers; appraisers were appointed to view it and viewed it, and it is idle to say that the subject of the transfer was not talked about by the family fully together, and that they consulted freely and fully together, she with the rest, and although there is no evidence of the proper execution of the deed by her, an inference is fairly to be drawn that it was properly executed and acknowledged before the proper officers, from the fact of its delivery by Judge Ingersoll and its acceptance by the bank. True, she may not have consulted counsel, strictly so speaking, but she was in daily intercourse with those for whom she made the deed, who were consulting counsel, and she must have understood the full effect and import of her act; her husband had employed as good counsel as could be had in the city, her father was a man of age and experience, her connections, as given by her to Mr. Eells, were among the best; the court cannot believe that she acted unadvisedly and without proper counsel. If she had acted hastily, without time or opportunity for deliberation, in the absence of advice, and without time or opportunity to obtain it, the

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court would be inclined to take a different view of it. I have no doubt but this wife was sorely affected by the arrest and indictment of her husband, and that fear and apprehension for his safety filled her heart. But can the court say that this was caused by the act of the bank, or by the fact of his guilt and possible imprisonment, such as would naturally follow with any wife who loved her husband? Too much time elapsed between the interview, claimed to have accomplished this duress, and the delivery of this deed to warrant the court in giving it the effect claimed. In all the cases cited by learned counsel we find no such interval of time elapsing between the duress and the execution of the contract. Then, too, there are certain inferences which a court cannot help drawing from the fact of the two years delay in beginning this suit.

We have no word of testimony in regard to it, no word of explanation. It is hardly necessary, however, to comment upon this. These being my views upon the testimony and the law of the case, and regardless of any sympathy the court may have, as an individual, for this woman, I sustain the motion to dismiss.

To which findings and decision the plaintiff excepted.

And thereupon before judgment the plaintiff filed her motion for a new trial in this case, upon the following grounds, namely:

1. That the court erred in denying the application of the plaintiff for a new trial, and in refusing to allow the plaintiff to have a trial by jury in this case, and in deciding that the same should be tried to the court, and in trying the same by the court without a jury, to which decision and trial by the court the plaintiff excepted.

2. That the court erred in holding and deciding, against the objection of the plaintiff that, upon the motion made by the defendant to dismiss this case on the alleged ground that the evidence introduced by the plaintiff in the case did not allow any right of recovery in favor of the plaintiff, such motion involved a hearing and determination by the court as to the weight and sufficiency of the evidence to sustain the claim set forth by the plaintiff in her petition—and not merely whether the evidence tended to support such cause of action. To which decision the plaintiff excepted.

3. That the court erred in holding and deciding, against the objection of the plaintiff, that, upon such motion so construed by the court, the defendant and not the plaintiff was entitled to the opening and closing argument. To which decision the plaintiff excepted.

4. That the court erred in deciding such motion on the weight and sufficiency of the evidence introduced by the plaintiff, and not merely on, or as to what, the evidence tended to show as to the case made in the petition. To which decision the plaintiff excepted.

5. That the court erred in deciding the case upon its merits under such motion. To which decision the plaintiff excepted.

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6. That the finding and decision of the court is not sustained by sufficient evidence, and is contrary to the evidence in the case.

7. That the decision of the court is contrary to the law of the case.

8. That the finding and decision of the court is contrary to the evidence and law of the case.

To all of which findings and decisions in the sixth, seventh and eighth clauses on his motion the plaintiff also excepted.

NEGLIGENCE—STREET RAILWAYS.

[Summit Common Pleas, December Term, 1891.]

DUSSEL V. AKRON STREET RAILROAD CO.*1. STREET RAILWAY PASSENGER—PRESUMPTION AS TO CARE.**

A passenger on a street car, in the absence of knowledge to the contrary, and acting in good faith, is entitled to presume that a street railway company will not be negligent in the performance of its whole duty, and will not expose such passenger to any hazard that reasonable care and prudence could fairly guard against.

2. RULE AS TO STOPPING CARS.

A street car should be stopped long enough to allow a passenger thereon to alight in safety.

3. ORDINANCE AS TO ASSISTING PASSENGERS TO ALIGHT.

An ordinance of a city making it the duty of conductors of street cars to assist passengers to alight, may be considered by the jury in determining what actual assistance should have been given beyond stopping the cars for a reasonable time.

4. PROXIMATE CAUSE DEFINED.

"Proximate cause" is a cause from which a man of ordinary experience and sagacity would foresee that the result would follow, that the injury was of such a character as might reasonably have been foreseen or expected as the natural and ordinary result of the negligence complained of.

5. RULE AS TO CARE AND SKILL REQUIRED.

The law requires the utmost care and skill which prudent men are accustomed to use under similar circumstances, but the rule is not to be pressed to an extent which would make the conduct of a business so expensive, as to be wholly impracticable.

6. PLEADING—CONTRIBUTORY NEGLIGENCE—NEGATIVE AVERMENT.

In an action for personal injuries caused by the negligence of defendant, it is not necessary for plaintiff to allege that the injury was caused without negligence on her part, but having pleaded, and issues having been taken thereon, the defendant is entitled to the benefit of the defense of contributory negligence, the same as if affirmatively alleged in the answer.

7. CHARGE TO JURY—INSTRUCTION AS TO DISAGREEMENT.

A jury in an action for personal injuries may well remember that if they disagree that the contention must be settled finally by a jury of twelve men no better qualified to try the issues of fact and upon no better presentation of the case.

8. SAME—RULE AS TO DISAGREEMENT.

A disagreement should not be had when an agreement can be reasonably secured by an impartial, candid and fair concurrence of the individual judgment of each juror.

*The judgment in this case was affirmed by the circuit court, April term, 1892, and by the Supreme Court, 52 Ohio St., 648, unreported.

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9. SAME—INSTRUCTION AS TO FINDINGS.

Both parties are entitled to the independent and best judgment of each juror, therefore it is the duty of a juror not to yield a well grounded conviction because it does not accord with the convictions of his fellow jurors.

10. SAME—INSTRUCTIONS AS TO FINDINGS.

Experience shows that the candid, impartial judgment of ten or eleven intelligent men is a safer guide than of one or two equally candid, intelligent and impartial men. Therefore, while one or more men may be right in their convictions, it is safer for them to consider well the sources of their convictions before they finally decide against an agreement.

This suit was originally brought by Lida M. Dussel against the Akron Street Railroad Company to recover for a personal injury alleged to have been received by her at the hands of defendant in the following manner, to-wit:

The claim is that on or about October 2, 1889, she was a passenger on one of the cars of the defendant company, and that she undertook to leave said car at the corner of Market and Main streets in the city of Akron, and that, before she had left the car, the same was started, and she was thrown to the ground, and received the injury complained of. The defendant denies substantially everything in the petition, except that the defendant is a corporation.

Charge to the Jury.

VORIS, J.

The trial of a civil action conducted with dignity, intelligence and good judgment, and I am happy to say that as far as counsel are concerned this has been such, and consummated by the impartial, conscientious and intelligent finding of a jury constitutes the performance of a public service of the highest character. The court knows of no more important public duty than you are now engaged in. You constitute an indispensable part of the court whose offices are just as important and dignified as those of the judge presiding. The courts thus constituted are the supreme power that finally determines all litigated contentions; and to whose power all the people and every public officer of the state must yield.

Hence you see that the people justly take a deep interest in the determination of jury trials. Public confidence is strengthened or shaken as juries discharge intelligently or loosely their duties. I make these suggestions because I want to impress upon you that the final duty you are about to perform is one of very great importance, one that deeply concerns the public welfare as well as the litigating parties.

You have been carefully selected from the citizens of the county because of your special fitness and qualification to discharge these important duties.

It is fair to say that the experience of mankind goes to show that the candid, impartial judgment of ten or eleven intelligent men is a safer

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guide than that of one or two equally candid, intelligent and impartial men; and while one or two men may be right in their convictions yet it is safer for them to consider well the sources of their convictions before they finally decide against an agreement. Yet every juror should feel that it is his duty not to yield a well grounded conviction, because it does not accord with the convictions of his fellow jurors. Both parties to this action are entitled to the independent and best judgment of each juror.

A disagreement should not be had when an agreement can be reasonably secured by an impartial, candid and fair concurrence of the individual judgment of each juror.

You may well remember that if this jury disagree, that this contention must be settled finally by a jury of twelve men, in no respect better qualified to try the issues of fact than you are, and upon no better presentation of the case to them.

Honest, candid, independent discussion leads to truth, heated controversy to disagreement.

I will now read the pleadings to better enable you to remember the boundaries of the case. Which were thereupon read.

The effect of which answer except as to the admitted matter, which is to be taken by you as true, is, to cast upon the plaintiff the burden of maintaining all the other allegations of her petition by a preponderance of the evidence. That is, she must maintain by a preponderance of the evidence the acts of negligence alleged in the petition to have been committed by the defendant; that she was so injured thereby; and the other grounds upon which she asked to be compensated, before she is entitled to recover.

We hold that it was not necessary for the plaintiff to allege in her petition "that said injury to the plaintiff was caused without negligence on her part;" but having been pleaded and issue taken thereon, though the defense of contributory negligence is not affirmatively set up in defendant's answer, we think that under the state of the pleadings, that the question of contributory negligence on part of the plaintiff may be submitted to the jury as part of the case to be determined by you.

The court will now define what we mean by negligence that will support an action. It must consist in some act or omission of duty that in the natural and ordinary course of events is the immediate cause of an injury to another, and resulting in some substantial damage. It is also defined as being the want of ordinary care, and may consist in doing something which ought not to be done, or in not doing something which ought to be done. By ordinary care, we mean that degree of care which persons of ordinary care and prudence are accustomed to use and employ, under the same or similar circumstances, in order to conduct the enterprise in which they are engaged in a safe and successful

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termination, having due regard to the rights of others, and the objects to be accomplished. Ordinary care required by the rule, has not only an absolute, but also a relative signification. It is such care as prudent persons are accustomed to exercise, under the peculiar circumstances of each case. If called into exercise under circumstances of peculiar peril, a greater amount of care is required than where the circumstances are less perilous; because prudent and careful persons, having in view the object to be obtained, and the just rights of others, are in such cases, accustomed to exercise more care than in cases less perilous. The amount of care is indeed increased, but the standard is still the same. It is still nothing more than ordinary care under the circumstances of that particular case. The circumstances, then, are to be regarded in determining whether ordinary care has been exercised.

The want of proper care is the want of that care which a reasonable man, guided by those considerations which should regulate conduct of human affairs, would have exercised under the circumstances of that particular case, the failure to observe for the protection of the interests of another person that degree of care, precaution and vigilance which the circumstances justly demand.

There is no presumption of negligence as against either party to this suit, except such as arises from the facts proven. Indeed, the presumption of law is, that neither party was guilty of negligence, and such presumption must prevail until overcome by the evidence submitted to you.

Intent is not an element of legal negligence; therefore the plaintiff need not show that the injury was intentional.

The negligence complained of, in order to enable the plaintiff to recover, must be the proximate cause of the injury. I mean by "proximate cause," a cause from which a man of ordinary experience and sagacity would foresee that the result would follow; that the injury was of such a character as might reasonably have been foreseen or expected as the natural and ordinary result of the negligence complained of. The injury must have been the direct and not the remote result thereof. In this sense you will inquire into the evidence to determine whether the defendant was guilty of the negligence with which it is charged.

In the light of the evidence, how do you find the facts alleged in plaintiff's petition to be?

Did the plaintiff become a passenger on the car of the defendant on or about October 2, 1889?

Was she thrown violently to the ground while in the act of leaving the car, by the starting of the car without notice or warning?

Was she thereby greatly injured?

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Were the injuries caused without negligence on her part, but because of the negligence of the defendant in the respect named in the petition?

Did the defendant furnish a defective car?

Were the appliances insufficient for stopping and holding the car?

Did the conductor or motineer neglect to hold the car stationary until the plaintiff alighted?

Were they, or either of them, negligent in starting the car while she was still on the car, and in the act of leaving it?

Did the conductor neglect to assist the plaintiff to alight from the car?

These are questions you must answer affirmatively from a preponderance of the evidence, as hereinafter explained and limited, before you can find for the plaintiff.

You must also be satisfied by a like preponderance of the evidence of her injuries and the extent thereof before you can award damages.

How do you find these facts to be? The order in which I have stated these question suggests a logical and practical course for you to take in your deliberations, though not obligatory on you. How do you find these facts? The evidence and our instructions to you should be your sole guides in determining the true answer to these questions; you have no right to indulge in speculation or conjectures not supported by the evidence.

The plaintiff can only recover upon the particular act of negligence complained of in the petition; but it is sufficient if you find any such negligence on part of defendant—this is the explanation and limitation to which I call your attention—that proximately cause the injury complained of, if, in other respects your finding answers the conditions of our instructions to you.

If, guided by these instructions, you should find that the plaintiff's charge of negligence is not supported by such preponderance of the evidence, you need go no further, but find for the defendant.

Or, if you should find from the evidence that the defendant was so guilty of negligence and that it proximately caused the injuries complained of, yet, if you find from a preponderance of all the evidence that the injury complained of would not have occurred but for the concurring negligence of the plaintiff directly contributing thereto; I do not use the term immediate in the sense of being immediate in point of time, but as directly or approximately, and not remotely, contributing thereto.

An approximate cause is a probable cause, a remote cause is an improbable cause—that is, if, by the exercise of ordinary care and prudence she could have avoided the injury, then she cannot recover, for it was the duty of the plaintiff at the time to exercise ordinary, reasonable care and prudence under all the circumstances to protect herself from injury.

But no presumption of negligence can arise against the plaintiff except that produced by the evidence in the case.

The plaintiff cannot recover compensation for any damage which she might have avoided by the use of ordinary care and prudence. So, if she did not take reasonable care of herself under the circumstances, or if she exposed herself to hazard she ought not to have encountered under the circumstances known to her, or that reasonably ought to have been known to her, and she thereby caused injury to herself, she cannot recover therefor.

Or, if you believe from the evidence that the injury to the plaintiff happened to her by mere accident, without any fault on the part of defendant; when I speak of the fault of defendant I include its conductor and other employees of defendant on the car at the time of the injury—the plaintiff cannot recover.

But, if you should find she was not guilty of such contributory negligence and you further find from these instructions and guided by them, that the defendant was guilty of negligence as herein defined and limited, and that the plaintiff was injured thereby, your verdict should be for the plaintiff, and for such an amount as will fully compensate her for the injuries sustained by her, by reason of the negligence complained of, but it can not be for other injuries than those caused by the negligence complained of, guided in that respect by the instruction the court will give you further on.

In general, the passenger carrier is bound by the acts of its employees and agents, in the scope of their employment; and must answer for their negligence or wrongful performance in the scope of their employment. In other words, the negligence of the conductor and motorman on this car, in the scope of their employment, would be the negligence of the defendant company, for which the defendant would be held liable, if you find that they or either of them were negligent in the performance of their duties as such employees and agents of the defendant, in respect to the negligence charged.

As to stopping cars; the court cannot say to you as matter of law how long the car of the defendant ought to have stopped when plaintiff got off; but whether the car did stop, or whether it stopped long enough for plaintiff to alight with safety, are matters of fact for you to determine under all the circumstances of the case given you in the evidence. We do, however, say to you that the car ought to have been stopped long enough to give the plaintiff reasonable opportunity to alight in safety.

What actual assistance beyond stopping the cars for a reasonable time the conductor ought to have given to the plaintiff, if any, we leave as a question of fact for you to determine under all the circumstances developed by the evidence, and you may consider the ordinance of the city, making it the duty of the conductor to assist passengers to alight.

in connection with the other evidence in the case, giving it such effect as you think it entitled to.

The defendant was not the insurer of the safety of the plaintiff in alighting from the car, but by accepting her as a passenger on its car, it bound itself to provide her with a safe car to transport her to the place of destination, and not to expose her to any hazard in alighting, that reasonable care and prudence could prevent; and in taking passage on the car, she took upon herself the hazard incident to passenger transportation upon the defendant's car when properly managed only, and upon a car competent for the service to which it was applied, at the time of the injury.

As matter of public policy the law requires a strict performance of the obligations assumed by the public carrier. In accepting the passenger for transportation, the defendant cannot be heard to say that it is not liable for the injuries caused to the passenger by its performance, while the relation exists, unless it has exercised, under all the circumstances, that degree of care and prudence in its management, and in the instrumentalities employed by it, that prudent men in like circumstances usually employ, and commensurate with the hazards ordinarily to be encountered. The rule requires that it should do everything necessary to secure the safety of its passengers, reasonably consistent with the business and the means of conveyance employed in street railway carriage.

The law requires the utmost care and skill which prudent men are accustomed to use under similar circumstances, but the rule is not to be pressed to an extent which would make the conduct of the business so expensive as to be wholly impracticable. But the common carrier must do all that any one in his position could reasonably do to guard against injury to his passengers, and to provide such facilities—instrumentalities—as are required for the safe and prudent carriage of passengers for pay. In the absence of knowledge to the contrary, if the plaintiff acted in good faith, she was entitled to presume that the defendant would not be negligent in the performance of its whole duty to her, and that she would not be exposed to any hazard that reasonable care and prudence could fairly guard against.

As to the measure of damages, we say to you that if the plaintiff is entitled to recover, she is entitled to such sum as in your judgment, guided by the evidence, will compensate her for the injury, caused by the negligent act of the defendant, but it must be confined to the injury caused by such negligence of the defendant, and not caused by any negligence as above defined, on her part. This should include compensation for impaired health, mental anguish and physical suffering, expenses of surgical and medical attendance and nursing; bodily pain according to its degree and probable duration; bodily injury, taking into account loss of time, the extent and probable duration of the injury, its effect on the health, the mental and physical powers, the capacity for labor, the pur-

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suit of an occupation and earning of money; as you find the facts to be from the evidence.

While it is no defense to say that the plaintiff was a person of susceptible nervous diathesis, or infirm health, and liable to break down from nervous exhaustion or other causes, yet these circumstances as you find the fact to be, may be and should be considered by you in determining what compensation she ought to receive, if any, by reason of future continued impaired inability to earn wages or engage in profitable employment, as bearing upon the question of the length of time she may or may not continue to be disabled and the probable duration of her life. But for whatever such impairment she has so sustained or will sustain, and caused by such negligence of the defendant, she is entitled to be compensated, so far as you can reasonably ascertain from the evidence. What effect, if any, did continuing to teach after October 2, 1889, by plaintiff have? Did it, or did it not, cause or aggravate her condition? These are to be determined by you in the light of the evidence submitted to you. We say to you that for any suffering or impairment caused or sustained by reason thereof she cannot recover, if reasonable care and prudence under all the circumstances—and the surrounding circumstances should be considered in determining whether she exercised reasonable care and prudence—she would have avoided them. The defendant cannot be charged with the consequences of the want of reasonable care and prudence of the plaintiff that caused her suffering and impairment that otherwise she would not have endured. But we say to you however, that it is not sufficient to defeat her action that she thereby only aggravated the injury caused by the negligence of defendant.

As to the amount of compensation, the court can give you no further assistance. The law has wisely left that to the intelligence, candor and impartial judgment of twelve jurors. Neither should your prejudices or sympathies in the least affect that judgment. What does a fair consideration of the evidence say that impartial justice demands.

It is the pride of our jurisprudence that justice is administered impartially. The law loves even handed justice and is no respecter of persons. The rich, and the poor, the weak and the influential, are alike entitled to its protection. You are the exponents of that sense of justice.

At the request of counsel for defendant we instruct you as follows:

Where physicians testify that plaintiff's injuries are permanent, and that, if she were sick from other causes, the injuries would cause serious complications, it is proper to submit to the jury the question of the plaintiff's liability to suffer more from other illness than she would otherwise have done.

A tort to health already impaired is redressed by giving damages both for any further impairment, and for any obstruction occasioned by the tort to recovery from existing disease.

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That it is the jury's duty to consider the plaintiff's physical condition before and since the injuries, the physical and mental pain suffered on account of the injuries during the same time, the amount of future pain to arise therefrom, together with all other circumstances shown in evidence, and considering all the circumstances aforesaid, is proper.

In action to recover for a personal injury, medical evidence of plaintiff's condition, both before and after suit brought, is competent to show the nature and effects of the injury, and its character as to permanence.

And the above and foregoing was all of the charge given to the jury by the court.

Defendant requests the court to submit special findings to the jury, which request the court refused; to which refusal the defendant excepted.

And thereupon the jury retired.

The plaintiff asks the court to note the following exceptions:

1. To the court's instructions in the charge of the pleadings in the case as regards contributory negligence on the part of the plaintiff, to the court's charging that contributory negligence is to be taken as plead.

2. To the charge of the court as to the burden of proof, and especially to the failure of the court to charge that upon contributory negligence the burden is upon the defendant, if it arises in the case at all.

3. To that portion of the charge which speaks of the care due from the defendant as being ordinary care, and of the failure of the court to charge that the care required of the defendant is the highest degree of care which is practicable under the circumstances.

4. To the charge of the court that there is no presumption of negligence except such as arises from the facts proved, and to that part of the charge in which he says the injury must be the direct cause and not the presumed result, excepting especially to that language as liable to be misunderstood and misleading.

5. To that part of the charge which treats of the plaintiff's negligence after the injury, and to each part thereof.

6. To that part of the charge which limits the care due from a common carrier to that which does not involve too great expense.

7. To the request of the defendant which was read to the jury.

The defendant asks the court to note the following exceptions:

1. To that part of the charge referring to the safety of following the judgment of ten or eleven of the jurors by the one or two, or not disagreeing, and the effects of a disagreement, the substance of that.

2. To that part of the charge which says it is not necessary to aver in the petition the want of negligence of the plaintiff.

3. In referring to that part of the charge which puts sundry questions with reference to alleged negligence of the defendant: "Did the defendant stop its car? Did it start its car?" and so forth. In that connection in omitting to put the further question, did the plaintiff when on

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the platform after the car had started continue to get off when she could have remained on the car until she caused it to be again stopped, excepts to have given the series of questions put, omitting others in issue, as being misleading.

4. To that part of the charge which says that the jury should not conjecture or speculate as to the accident.

5. To that part of the charge which says that the car ought to have been stopped long enough to enable the plaintiff to alight and not in that same connection have said that if it did not do so yet the plaintiff had no right to get off the car if by the exercise of reasonable care she could have remained on the same and avoided the accident.

6. To that part of the charge relating to the matter of damages which said that the impaired health should be considered in relation to her future suffering, and to the refusal to give the requests of the defendant.

And thereupon the jury, after due deliberation, returned a verdict for the plaintiff and assessed her damages at \$3,000.

DEBTORS AND CREDITORS.

[Cincinnati Superior Court, June Term, 1890.]

*HENDERSON-ACHERT LITHOGRAPHING CO. v. BELFORD, CLARKE & CO.

1. NOTE GIVEN FOR DOES NOT EXTINGUISH ACCOUNT.

A note given for an open account does not extinguish or discharge the account unless such is the express agreement of the parties, and the burden of showing such agreement is upon the debtor.

2. NOTE MERELY EXTENDS TIME OF PAYMENT.

The acceptance of a note given for an open account, merely extends the time of payment of the debt; and if the note is not paid when due suit can be brought upon the note or the account.

3. SUIT ON ACCOUNT—RETURN OF NOTES.

Suit may be brought upon an original account for which notes have been given and the time extended at any time, if, for any reason, the contract extending the time of payment is lawfully annulled or rescinded; and it is sufficient if the notes are returned at any time up to the day of trial.

*Judgment affirmed in general term, January, 1891, and by Supreme Court, 52 Ohio St., 668, unreported. In the Supreme Court, Kramer & Kramer, Jackson & Swarts, and Lowrey Jackson, for plaintiff in error, cited: 1 Bigelow on Fraud, 1888 Ed., 81, 82, 83, and cases cited; Durbin v. Fisk, 16 Ohio St., 533; Woolen Mills Co. v. Titus, 35 Ohio St., 253, 256; Merrick v. Boury, 4 Ohio St., 60; Wise v. Miller, 45 Ohio St., 388, 397; Miller v. Woods, 21 Ohio St., 485; Muckolls v. Pinkston, 38 Ala., 615; Babcock v. Bank, 28 Conn., 302; Phillips v. Bullard, 58 Ga., 256; Hall v. Ballon, 58 Iowa, 585; Sledge v. Scott, 56 Ala., 202; McCormick v. Joseph, 77 Ala., 236; Ohio Coal Co. v. Davenport, 37 Ohio St., 194, 197; Barrett v. Hart, 42 Ohio St., 41; Sherer v. Piper, 26 Ohio St., 476; Wharton on Evidence, Sec. 1090; 2 Starkie on Ev., 38; White v. Cotzhausen, 129 U. S., 329; 1 Greenleaf Ev., Sec. 441; Fire Department v. Buhler, 35 N. Y., 177; Hyde v. Melvin, 11 Johns., 521; Mohlson's Book v. Boardman, 47 Hun., 135; Hennessy v. Farely, 18 Daly, 468; Tomlin v. Hillyard, 43 Ills., 300; 1 Wharton Ev., Sec. 507 and cases; Laws on Expert Ev., 497, Rule 65 and cases; Laws on Expert

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4. PURCHASE BY INSOLVENT DEBTOR.

The purchase of goods by an insolvent buyer, who conceals his insolvency with intent to injure the vendor is fraudulent and voidable, but a purchase under like circumstances, save that such intent is absent, is not in law fraudulent. The simple failure to disclose a condition of insolvency does not imply a purpose to defraud.

5. FRAUD—PRESUMPTION OF CONSEQUENCES.

Notwithstanding fraud must be proved and not presumed, there is a presumption that every reasonable man expects and intends the ordinary and probable consequences of known causes and conditions.

6. PRESUMPTION OF INTENTION TO DEFRAUD.

The intention of a purchaser not to pay for goods may be presumed when he has knowledge of his own insolvency and inability to pay for them; and such intention may be inferred from the mere fact that the purchaser had undisclosed knowledge of his gross insolvency, but such inference may be rebutted.

7. RULE AS TO GIVING NOTE BY INSOLVENT DEBTOR.

The giving of notes by defendants in settlement of an account without intent to defraud, although knowing themselves to be insolvent, is not fraud in law, where there was no concealment of the insolvency, but simply a failure to disclose it, unless the insolvency was so gross as to lead to the presumption of an intent not to pay.

8. FACTS JUSTIFYING DISREGARD OF NOTES.

The fact that plaintiffs were induced to accept notes in settlement of an account against defendants upon receipt of a letter representing that there was about to be an increase of capital stock, when there was neither intention nor expectation of increasing such stock, justifies plaintiff in disregarding the notes and suing on the original account.

9. RIGHT TO SUE AT ONCE UPON ACCOUNT.

Where an account was due for which notes were given to extend the time of payment, and the holder was induced to accept such notes by false representation, or fraudulent concealment by the defendant, the plaintiff had a right at once to sue upon the original account.

Charge to the Jury.

HUNT, J.

Gentlemen of the Jury: This is an action in which the plaintiff, the Henderson-Achert Lithographing Company, seeks to recover from the defendant, Belford, Clarke & Company, on a certain account set forth in the petition for lithographing work, the sum of \$2,988, with interest from August 19, 1889.

Ev., p. 164, Rule 33 and cases; Ib. p. 497, Rule 65; Stillwater Turnpike Co. v. Coover, 26 Ohio St., 520; Railroad Co. v. Schultz, 43 Ohio St., 270; Legg v. Drake, 1 Ohio St., 286; Board of Education v. Mills, 38 Ohio St., 383; Grove v. Hodges, 55 Pa. St., 518; 1 Bigelow on Fraud, '88 Ed., 590, *et seq.*; Bank v. Bogart, 81 N. Y., 191; Dambmann v. Schulting, 75 N. Y., 55; Hadley v. Importing Co., 13 Ohio St., 502, at p. 513; General Ch., pp. 88, 89, 90; 1 Bigelow Fraud, '88 Ed., 560; Rutherford v. Williams, 42 Mo., 18; Atwood v. Small, 6 Clark and Fin., at pp. 446, 447; Mulvey v. King, 39 Ohio St., 491; Smith v. Bowler, 1 Disn., 520; (affirmed, 2 Disn., 153); 1 Bigelow, Fraud, '88 Ed., 549 and 548; Morris v. Talcott, 96 N. Y., 100, per Ruger, C. J.; Fogg v. Pew, 10 Gray, 409, at p. 415; Wald's Pollock on Contracts, p. 534, citing; McCracken v. West, 17 Ohio, 16; Way v. Hearn, 13 C. B., N. S., 292; Peck v. Gurney, L. R., O. H. L., 377; Wald's Pollock, 535; Kerr on Fraud and Mistake, p. 93.

*Wilby & Wald, for defendant in error, cited: Miller v. Woods, 21 Ohio St., 485; in Bebout v. Bodle, 38 Ohio St., 500; Woolen Mills v. Titus, 35 Ohio St., 253; Edgington v. Fitz Maurice, 29 Ch. D. at 483; Barrett v. Hart, 42 Ohio St., 41, 44;

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The defendant files an answer in which it denies that it is indebted to the plaintiff in the manner and form so averred in the petition, and in any sum whatever, and denies each and every other allegation in the petition except the averment of the corporate capacity of the parties. It is further alleged as a defense that all the accounts between the defendant and the plaintiff were closed by note long before the commencement of this action, and that none of the notes were due at the time this action was begun.

The plaintiff, for reply, says that three notes, one for one thousand dollars, dated Chicago, July 11, 1889, at three months after date, another for fifteen hundred dollars dated Chicago, August 6, 1889, due three months after date, and a third note dated Cincinnati, August 19, 1889, for \$488.09, at three months after date, were given to the plaintiff by the defendant at or about the dates named, covering the amount of the account set forth in the petition, and that the notes were received and accepted by the plaintiff only in conditional payment of the account, and not otherwise in any way. There is a further averment, that at the time the defendant gave the notes which operated as a conditional payment, extending the time to the dates of their maturity, the defendant was, with the knowledge of its officers, hopelessly insolvent, which fact was unknown to the plaintiff, whose officers supposed the defendant to be solvent, relying upon the statements made by the defendant to the plaintiff on May 14, 1888, that the defendant was about to add two hundred and fifty thousand dollars to its cash capital, and that the officers of the defendant failed to disclose their insolvency to the plaintiff, and failed to notify the plaintiff that no such sum had been added to the cash capital.

Coal Co. v. Davenport, 37 Ohio St., 194; *Barrett v. Hart*, 42 Ohio St., 41; *McCormick v. Joseph*, 77 Ala., 236; *Mulvey v. King*, 39 Ohio St., 491 at 494; *Benton v. Ward*, 47 Fed. Rep., 253-256; *Wilcox v. University*, 32 Ia., at top 374; *Brooks v. Hamilton*, 15 Minn., 26 at p. 33; *Lanier v. Hill*, 25 Ala., at bot. 558; *Da Lee v. Blackburn*, 11 Kan., 190 at 205; *Newbigging v. Adam*, 34 Ch. D., 582; 13 App. Ca., 308; *Karbergs cases*, 92, 3 Ch. 1, 11, 12, 13; *Smith v. Richards*, 83 U. S. (13 Pet.) 26; *Hammond v. Pennock*, 61 N. Y., 145 at p. 152; 1 Story on Eq. Jur., Sec. 193 and cases cited; *Perry on Trust*, Sec. 171; in *Derry v. Peek*, 14 App. Cases, 1889; in *Trail v. Baring*, 4 D. J. S., 329; *Mooney v. Davis, Assignee*, 75 Mich., 188; Am. and Eng. Ency. Law, Vol. 11, 376; *Aetna Ins. Co. v. Reed*, 33 Ohio St., 283 at 294; *Beach v. Bemis*, 107 Mass., 498-499; *Beebe v. Knapp*, 28 Mich., 53; *Stone v. Covell*, 29 Mich., 359; *Ford v. McComb*, 12 Bush, 723; *Munroe v. Pritchett*, 16 Ala., 785-790; *Einstein v. Marshall*, 58 Ala., 153; *Sims v. Elland*, 57 Miss., 607; *Bushind v. Barrington*, 36 Minn., 320; *Middleton v. Jerdee*, 73 Wis., 39; *Cooper v. Schlesinger*, 111 U. S., 148-155; *Nevada Bk. v. Portland Nat. Bk.*, 59 Fed. Rep., 338; *Matthews v. Bliss*, 22 Pick., 48; *Safford v. Grant*, 120 Mass., 20 at page 25; *Morgan v. Skiddy*, 62 N. Y., 319; *Pollock on Contracts*, Wald's 2d Ed., 528; *Central Ry. Co. v. Kisch*, L. R. 2, H. L., 99; *David v. Park*, 103 Mass., 501; *Mead v. Bunn*, 32 N. Y., 275-280; *Roberts v. Plaisted*, 63 Me., 335; *Upton v. Einglehart*, 3 Dill., 496-501; *Eaton v. Winnie*, 20 Mich., 156; *McClelland v. Scott*, 24 Wis., 81; *Risch v. Von Lilienthal*, 34 Wis., 250; *Matlock v. Todd*, 19 Ind., 130; *Wannell v. Kem*, 57 Mo., 478; *Caldwell v. Henry*, 76 Mo., 254; *Bank v. Hunt*, 76 Mo., 439; *Carmichael v. Vandebur*, 50 Ia., 651; *Porter v. Fletcher*, 25 Minn., 493; *Olson v. Orton*, 28 Minn., 36; *McKee v. Eaton*, 26 Kan., 226; *Morris v. Talcott*, 96 N. Y., 100; *Fogg v. Pugh*, 10 Gray, 4-9; *Way v. Hearn*, 13 C. B. N. S., 292; *Wells v. Cook*, 16 Ohio St., 67.

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There is still further averment that as another ground for a rescission of the contract which is to be assumed from the acceptance of the notes, that the defendant by letter dated May 14, 1888, representing that it was about to add to its cash capital the sum of two hundred and fifty thousand dollars, thereby representing to the plaintiff that it had made arrangements which would enable it to add that sum to its cash capital, all of which representations were false, and that the defendant had neither the intention nor any reasonable expectation of being able to add such sum to the cash capital; but the plaintiff, believing them to be true, extended the time of the payment of the indebtedness; and when it discovered the alleged fraud and failure to disclose the falsity of such statements and representations, the plaintiff rescinded any agreement to be inferred from the acceptance of said notes, and so notified the defendant forthwith, and has returned the notes to the defendant.

When a note is given for an open account, it does not extinguish or discharge the account unless such is the express agreement of the parties, and the burden of showing such an agreement is upon the debtor. In the absence of such agreement, the acceptance of a note merely extends the time for the payment of the debt; and if the note is not paid when due, suit can then be brought either upon the note or on the account; and, further, if for any reason, the contract extending the time for the payment of the debt is lawfully annulled or rescinded before the note matured, then suit may be brought upon the account at once, and if the plaintiff in this case had a legal right to disregard the notes, and sue upon the account, it was not necessary for the plaintiff to return the notes before the suit, but the law would be satisfied if they returned the notes at any time up to the day of trial.

The defendant, in its answer, denies each and every allegation contained in the petition except the averment of corporate capacity, although there is a further averment that all accounts between it and the plaintiff were closed by notes long before the commencement of the action, and that none of the notes were due before the action was begun. It is true there is a general denial in the answer, which put in issue the allegations contained in the petition, except as to the averment of corporate capacity, but it is conceded by all the parties to this suit that the account itself is correct, and the defense is that the account was settled by certain promissory notes which had not matured at the commencement of the action.

The contention of the plaintiff is:

First: That the notes in question were received and accepted by the plaintiff only as conditional payment.

Second: That at the time the defendant gave the notes, which it is claimed operated as a conditional payment extending the time to the dates of their maturity, the defendant was, to the knowledge of its officers, hopelessly insolvent, which fact was unknown to the plaintiff, whose

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officers supposed the defendant to be solvent. On May 14, 1888, there was a statement made by defendant to plaintiff that the defendant was about to add two hundred and fifty thousand dollars to its cash capital, and that the officers of the defendant failed to disclose its insolvency to the plaintiff, and failed to notify the plaintiff that no such sum had been added to its cash capital.

Third: Because the defendant, by letter dated May 14, 1888, represented to the plaintiff that it was about to add to its cash capital the sum of two hundred and fifty thousand dollars, thereby representing to the plaintiff, as it is claimed by the plaintiff, that it had made some arrangements to enable it to add that sum to its cash capital, all of which representations, it is claimed by the plaintiff, were false, and that the defendant had neither the intention or any reasonable expectation of being able to add such sum to its cash capital, but the plaintiff believing the representations as alleged to be true when it extended the time of the payment of the indebtedness.

Fourth: When the plaintiff discovered the fraud and failure to disclose the falsity of such statements, the plaintiff rescinded the agreement to be inferred from the acceptance of said notes, and notified the defendant forthwith, and returned the notes to the defendant.

The burden of proof, so far as these allegations are concerned, is upon the plaintiff, and before the plaintiff can recover in this form of action the jury must be satisfied that the allegations in the reply on which the plaintiff relies for a rescission are true, and are fairly shown by a fair preponderance of all the evidence.

While it is true that an intention on the part of a purchaser of goods not to pay for them existing at the time of the purchase, and concealed from the party selling, is unquestionably such fraud as will vitiate the contract, it is none the less true, on the other hand, that where no such fraudulent intent exists, the mere fact that the purchaser has knowledge that his debts exceed his assets, though the fact be unknown or undisclosed to the seller, will not vitiate the purchase. Even, therefore, if it should be shown by a fair preponderance of the evidence that the defendant, Belford, Clarke & Company, had knowledge that its debts exceeded its assets, though the fact be unknown and undisclosed to the Henderson-Achert Company, it will not of itself avoid the contract, for it may be stated, as a general principle of law, that whether a purchaser's failure to disclose his known insolvency is fraudulent or not, depends upon the intention of the purchaser, and whether that intention was to pay or not to pay. That is a question of fact which the jury must determine from all the evidence in the case.

In order, therefore, to reach a correct conclusion in this case, there are certain presumptions which the law recognizes, and which are entitled to be considered by you; and while it may be said that fraud must

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be proved and will not be presumed, there is a presumption that every reasonable person expects and intends the ordinary and probable consequences of known causes and conditions. Hence, if a purchaser of goods has knowledge of his own insolvency and of his inability to pay for them, his intention not to pay should be presumed, or the insolvent purchaser, without any reasonable expectation of ability to pay, should be presumed to intend not to pay, or an intention might be inferred from the mere fact that the purchaser had undisclosed knowledge of his gross insolvency. It may be said, in brief, that the purchase of goods by an insolvent buyer, who conceals his insolvency, with intent to injure the vendor, is fraudulent and voidable, yet a purchase under like circumstances, save only that such intent is absent, is not in law fraudulent. The intent to injure must be of the essence of the fraud, and if that is absent it is wholly immaterial whether the insolvency of the purchaser was known to himself. It is true that knowledge by the purchaser of his own insolvency is necessary to establish the fraud, yet such knowledge of itself is entirely innocent. It is only when connected with the concealment of a fact that fraud is shown, and a distinction is made between the concealment of a fact and the failure to disclose a fact. The former implies a purpose, a design; the latter does not. The concealing of insolvency for the purpose of making a purchase may well avoid a contract, for it is the intention to injure. But the simple failure to disclose a condition of insolvency does not imply that purpose or design. In one case there is an act of concealment that involves an intellectual operation, the concealment of a purpose from which an intent may be inferred; the other is merely passing, and may be the result of causes and circumstances which do not involve intent.

It has been illustrated by the Supreme Court that where an insolvent merchant is engaged in an honest effort to retrieve his fortune, the appearance of wealth indicated by his stock in trade is not equivalent to a representation of solvency, and one who gives him credit without inquiry has no right to complain of fraud. We have thus indicated the rule where insolvency exists at the time of the transaction, for in this case it is claimed by the plaintiff that the defendant was hopelessly insolvent, and that the fact was known to its officers.

As we have said, the burden of proof to show insolvency of the defendant is upon the plaintiff, and it will be your duty to consider any evidence that may have been introduced touching directly the condition of Belford, Clarke & Company as to their assets and liabilities at the time of the transaction, and any evidence that may have been introduced as to the failure of Belford, Clarke & Company, and as to the condition of their assets and liabilities, as the same relate back to the time of this transaction, and any and all evidence that may have been introduced which may show the solvency or insolvency of the defendant at the time

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of the execution of the notes. Some evidence has been introduced touching the assets and liabilities of the firm in other states, and the depreciation of the assets by reason of the failure. This evidence may be considered by you in connection with other testimony on this branch of the case, in reaching a correct conclusion as to the financial condition of Belford, Clarke & Company at the time of the transaction in question. If, therefore, the defendant, Belford, Clarke & Company, was in a condition of insolvency and knew its inability to meet the notes, the intention not to pay the notes might be presumed; or if Belford, Clarke & Company were insolvent without any reasonable expectation of ability to pay the notes at the time the obligation was contracted, or if Belford, Clarke & Company had undisclosed knowledge of gross insolvency, an intention not to pay might be inferred from that latter fact, if shown, but the inference may be rebutted by other facts and circumstances, if such other facts and circumstances have been shown; for it would not have been a fraud in law for the defendants to have given the notes if the intent did not exist to defraud, although the defendants were insolvent, and there was no concealment, but simply a failure to disclose it to the plaintiff, provided that the insolvency was not so gross as to lead to the presumption of an intent not to pay.

It is further contended by the plaintiff that the defendant, by letter dated May 14, 1888, represented to the plaintiff that it was about to add the sum of two hundred and fifty thousand dollars to its cash capital, all of which representations were false; that the defendant had neither the intention or any reasonable expectation of being able to add such sum to its cash capital.

It is incumbent upon the plaintiff to show by a fair preponderance of the evidence that these allegations were true; that the defendant had neither the intention or any reasonable expectation of being able to add that sum to its cash capital. The letter in evidence, divorced from any other circumstance, is not predicated of an existing fact, and would not, of itself, be sufficient to justify a recovery in this suit, but you will consider the letter in connection with any other evidence bearing upon it, and if you find that the defendant did, by letter dated May 14, 1888, represent to the plaintiff that it was about to add the sum of two hundred and fifty thousand dollars to its cash capital, and that such representations were false, and that the defendant at the time had neither the intention or any reasonable expectation of being able to add such sum to its cash capital, and if you find that afterward, induced in whole or in part by such false statements, if any were made, the plaintiff, when it discovered the falsity of such statement, had the right to disregard the notes and sue upon the account for which the notes were given, your verdict should be for the plaintiff. But, on the other hand, if you find that when such statements were made at the time of the transaction, the intention existing

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to pay the notes, and that there was reasonable expectation of being able to add such sum to its cash capital, and that the plaintiff was not induced in whole or in part to accept the notes, then the plaintiff can not recover in this action and must rely on the notes for a recovery of the indebtedness.

The fact that the debt is not disputed is not material in this form of action, because a verdict for the defendant would not extinguish the debt. The plaintiff would then be remitted to his action on the notes.

The sole controversy in this case relates to the fact whether the notes were obtained as alleged in the reply by the fraudulent representations or the fraudulent concealment of the defendant by which, in whole or in part, the plaintiff was induced to accept the notes.

The law may be condensed in this statement; if the account was due when the defendant gave the notes and the plaintiff was induced to accept the notes, thereby extending the time of payment, by any false representation or fraudulent concealment by the defendant, the plaintiff had a right at once to sue upon the original account, and your verdict will be for the plaintiff. But if you find, on the contrary, from all the evidence in the case, under the rules I have given you, that these notes were given in good faith by the defendant, and so accepted by the plaintiff in the ordinary course and custom of business between the parties, and that there was no intention to defraud, although the company may have subsequently failed, then your verdict must be for the defendant; and you may to this end consider the mode and manner in which business was transacted between the parties, the character of the business itself, the length of time intervening between the receipt of this letter and the execution and delivery of the notes, and what influence it may have had in securing the notes, the conversations in Chicago or elsewhere, relating to the subject, the receipts relating to the two notes, if any have been produced; the conduct of the parties, and their mutual confidence, as may reasonably be inferred from their business relations and dealings, and any and all facts relating to the case, as well as to the reasonable inferences which may be drawn from the facts shown, to show what was the intent of the defendant at the time the notes were given, or in other words, the state of the mind, of the parties to the transaction..

It will be your duty, gentlemen of the jury, to consider these things solely upon the law and evidence. The solemn obligation which you have taken demands this of every juror. It is your exclusive province to measure the weight of the evidence to determine what weight and credibility should be given to the testimony, and ascertain, if possible, how far his interest, if at all, may have influenced the evidence of any particular witness, and, in short, as men of judgment, ripened by experience, reach such a conclusion as will be justified by the law and the evidence under your oaths.

It is your duty to consider the case solely, as I have said, from the law and the evidence given; and the solemn obligation which you have assumed demands this of every juror, and the law will not be content unless there is a conscientious discharge of this duty.

Mr. Wilby: "I want to except to the charge that actual fraud is necessary, wherever it is given. I want to except to the charge that there must exist the intention to defraud."

Mr. Jackson: "I wish to reserve an exception to the giving of all the charges asked by the plaintiff, and the refusal to give those which I asked and which were not given, and all the charge in regard to the letter of 1888, and also the last portion of your honor's charge in regard to reasonable inference."

And thereupon the jury retired for deliberation and returned a verdict for plaintiff. And the defendant duly filed its motion for a new trial on the grounds therein stated, which the court overruled and rendered judgment upon said verdict.

Plaintiff's requests to charge:

I.

I charge you that when a note is given for an open account, it does not extinguish or discharge the account unless such is the express agreement of the parties and the burden of showing such an agreement is upon the debtor. In the absence of any such agreement, the acceptance of a note merely extends the time for the payment of a debt; and if the note is not paid when due, suit may then be brought either on the note or the account. And, further, if for any reason the contract extending the time for the payment of the debt is lawfully annulled or rescinded before the note matures, then suit may be brought upon the account at once.

II.

I charge that if you shall find from the evidence that the defendant, when the notes referred to in the answer were given, had no reasonable expectation of being able to pay them when they fell due, because of a condition of insolvency known to the defendants or otherwise, and failed to disclose this fact to the plaintiff, who relied upon the supposed solvency of the defendant, and that the defendant would pay said notes, then your verdict must be for the plaintiff, with interest to the first day of this term; but the plaintiff must establish the fact that the reasonable expectation of not being able to pay them when they matured, because of the insolvency or otherwise of the defendant, did not exist at the time the notes were executed.

III.

I charge you that if you shall find from the evidence that in May, 1888, or at any time prior to the taking of the notes described in the

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answer, the defendant, by one of its officers, stated to the plaintiff that it intended to add \$250,000 to its cash capital if, in fact, it is shown by a fair preponderance of the evidence that defendant had no such intention, or if it is shown that this statement was made recklessly, without any intention of carrying it out; and if you find that afterward, induced in whole or in part by this statement, the plaintiff accepted the notes, then I charge you that the plaintiff, when it discovered the falsity of such statement, if the falsity of any such statement is established, had the right to disregard the notes and sue upon the account for which the notes were given, and your verdict should be for the plaintiff.

I charge you that it is a rule of evidence that ordinarily where witnesses are of equal credibility, a witness who testifies to an affirmative is entitled to credit in preference to one who testifies to a negative, because the latter may have forgotten what actually occurred, while it is impossible for the former to remember what never happened.

I charge you that you are entitled in reaching a conclusion to make any fair and proper inferences from the evidence in the cases for some facts, such as what was the state of a person's mind at a given time may not from their nature be proven absolutely, but may sometimes be inferred from other surrounding facts and circumstances.

IV.

To entitle plaintiffs to rescind the implied agreement to extend the time of payment to the maturity of the notes, it is not necessary for them to show that their sole, or even predominant, motive in extending the time of payment was the fraudulent representations or fraudulent concealment of defendants if any such fact existed; it is enough if such fraudulent representations and fraudulent concealment, if established, had material influence on plaintiffs, although combined with other motives in accepting the notes in question.

V.

I charge you that if the plaintiff had, when this suit was brought, the right to disregard the notes, under the law which has been given you, and sue upon the account, it was not necessary for the plaintiff to return the notes at that time, but the law was sufficiently complied with by the return of the notes at any time, even up to the day of trial.

Defendant's requests to charge:

I.

The plaintiff cannot recover unless it shows by a preponderance of evidence that the defendants were guilty of fraud at the time when the notes were given.

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Fraud is never presumed, but must be established by a fair preponderance of proof.

II.

It would not be fraud for the defendants to give the notes, although they were insolvent at the time, knew that fact, and failed to disclose it to plaintiff.

III.

The letter of May 14, 1888, affords of itself no ground for the rescission of the contract.

If you find that at the time the letter was written the defendants intended to add \$250,000 to their capital, the letter should be disregarded in your further consideration of the case.

VI.

The jury are instructed to consider no testimony save that allowed by the court. Questions asked by counsel, but held by the court to be incompetent, are not evidence, and must not be considered by the jury for any purpose whatever. Nor are such questions proper subject of comment by counsel in the argument.

X.

If the jury find that the defendant was insolvent at the time the receiver was appointed, that fact of itself would not authorize a finding that the defendant was insolvent at the time the notes were given.

XV.

The failure to disclose insolvency is not equivalent to concealment of insolvency.

A man, though grossly insolvent, has a right to go on in business and obtain credit without disclosing that fact to his creditors.

It is only where the failure to disclose is accompanied by acts of deception, which must be proved by evidence, that concealment arises, which amounts to fraud.

XIV.

The fraud charged by plaintiff is actual fraud—that is, fraud in fact. To constitute such fraud, there must have been an intention to deceive. An honest misrepresentation would not be sufficient; nor would a mere general intention to defraud creditors be sufficient.

The jury must find an intention to deceive the plaintiff existing in the mind of defendant at the particular time the notes were given.

If the jury do not find that fact established by a fair preponderance of the evidence, the verdict must be for defendant.

VIII.

If you find that defendant intended to pay the notes when they were given, your verdict must be for the defendant, no matter whether it was solvent or insolvent at the time, unless the misrepresentations alleged in the reply are shown.

IX.

If you find that defendants gave the notes, and did not intend to pay them at the time, that would be a fraud; but the burden of showing such non-intention is upon the plaintiff, and the fact of such non-intention must be found by the jury from competent evidence offered in the case.

IV.

If at the time the letter of May 14, 1888, was written, the defendants intended to add \$250,000 capital to their business, but subsequently failed to do so, the defendants were not bound to notify plaintiff that they had not done so, and the failure to so notify plaintiff would not constitute a fraud.

V.

The fact that the debt is not disputed is not material. A verdict and judgment for defendants would not extinguish the debt. The sole controversy in the case is whether the notes were obtained by fraud. If you find that there was no fraud, your verdict must be for defendants.

XI.

There is no evidence tending to show insolvency of defendant at the time the notes were given.

Your verdict must be for defendant unless you find some misrepresentation, known to be false by defendant, not known to be false by plaintiff, which induced the plaintiff to accept the notes, and which was made at or before the time the notes were accepted.

XII.

There is no evidence tending to show any misrepresentation whatever, except the letter of May 14, 1888, which I charge you is not sufficient of itself to justify a rescission of the contract on the part of plaintiff.

XII½.

If the jury find that at the time the letter of May, 1888, was written, the defendant did not intend to add \$250,000 to its capital stock, nevertheless the letter itself would not authorize a rescission unless in 1889,

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when plaintiff accepted the notes, the jury find that plaintiff did not know that the \$250,000 capital had not been added, but relied on the promise made in 1888.

XIII.

There is no evidence whatever tending to show that in May, 1888, the defendant did not intend to add the \$250,000 capital.

The jury are not authorized to find from the evidence introduced that the defendant did not intend to add said capital.

NEGLIGENCE—FELLOW SERVANTS.

[Mahoning Common Pleas, January Term, 1894.]

*ROBERT BYCRAFT v. L. S. & M. S. Ry. Co.

CONDUCTOR OFF DUTY NOT A FELLOW SERVANT OF CONDUCTOR.

A railroad conductor, in the discharge of no duty connected with his employment, riding on a pass upon another train than his own, from the point of destination of his train to his place of residence, with the consent, permission and knowledge of the conductor of the other train, is not a fellow servant of such conductor; and the negligence of the latter will not defeat a recovery by the former for injuries caused by the negligence of the conductor in control of such train.

*Judgment affirmed by the circuit court, March term, 1894, and by the Supreme Court, 52 Ohio St., 670, unreported. In the Supreme Court, Thos. W. Sanderson, Geo. C. Greene and O. G. Getzen-Danner, for plaintiff in error, cited: Wilton v. Middlesex R. R. Co., 107 Mass., 108; Sherman v. Railroad Co., 72 Missouri R., 62; Railroad Co. v. Caldwell, 74 Pa. St., 421; Gradin v. Railway Co., 16 Am. & E. R. R. Cases, 644; Kumler v. Railroad Co., 33 Ohio St., 150; Manville v. Railroad Co., 11 Ohio St., 417; Ryan v. Railroad Co., 23 Pa. St., 388; Price v. Railroad Co., 96 Pa. St., 267; Pennsylvania R. R. Co. v. Books, 57 Pa. St., 339; Patterson in his Railway Accident Law, Sec. 216; Tunney v. Midland Ry. Co., L. R., 1 C. P., 291; Ryan v. Railroad Co., 23 Pa. St., 384; Russell v. Railroad Co., 17 N. Y.; decided in 1858; Vick Admr. v. Railroad Co., 95 N. Y., 267; Gillshannon v. Railroad Co., 10 Cushing, 228; Amasa Seaver v. Railroad Co., 14 Gray, 466; McQueen v. Railroad Co., 15 Am. and Eng. R. R. Cases, 226; Railroad Co. v. Arnold, 31 Ind., 174; Hutchinson v. Railroad Co., 6 Eng. Ry. Cases, 580; Railway Co. v. Nichols, 8 Kansas, 505; Railway Co. v. Salmon, 11 Kansas, 83; O'Donnell v. Railroad Co., 59 Pa. St., 239; O'Brien v. Railroad Co., 138 Mass., 387; Ross v. Railroad Co., 5 Hun., 488; (affirmed, 74 N. Y., 617); Pennsylvania R. R. Co. v. Price, 96 Pa. St., 256; McDonough v. Lampher (Minn.), Dec. 18, 1893; Aben v. Railroad Co., 111 Ills., 203; Railroad Co. v. Ryan, 82 Tex., 565; Kansas City M. & B. R. R. Co. v. Phillips, (Ala.), April 26, 1893; Parkinson Sugar Co. v. Riley, 50 Kansas, 401; Evansville, etc., R. R. Co. v. Maddux, 134 Ind., 561; Texas & Pacific R. R. Co. v. Scott, 94 Texas, 549; Doyle Admr. v. Fitchburg R. R. Co., (Mass.), of October 15, 1894, 157.

W. S. and D. F. Anderson, for defendant in error, cited: "3 Ohio St., p. 201; 17 Ohio St., 197; Wood's Master and Servant, p. 850; 33 Ohio St., 150; Manville v. Railroad Co., 11 Ohio St., 417; 6 Ind., 39; Horton v. Mad R. Railroad Co., 8 Ohio St., 249; Columbus & Toledo Railroad Co. v. Sarah O'Brien, Admr., 2 Circ. Dec., 681; 5 Exchequer, 341; B. & O. R. R. Co. v. Traynor, 38 Md., 42; Bell v. Railroad Co., 63 Md., 439; 70 Penna St., 447; 84 U. S. (17 Wall.), 508; 59 Penna St., p. 239; 55 U. S. (14 How.), 468; 3 Allen, 18; 57 U. S. (16 How.), 469; 107 Mass., 108; 51 Pa. St., 316; 20 Minn., 125; 66 N. Y., 813; 2 Ohio St., 140; 4 Ohio St., 377; 10 Ohio St., 375; Packet Company v. McCue, 83 U. S., (17 Wall.), 508.

Bvcrst v Railway Co

The action in the court below was brought by the defendant in error to recover against the defendant, damages, which he sustained on July 8, 1892, in a collision between a freight train and a portion of another mixed freight and passenger train, which had broken off from the rear of the latter train. The accident occurred near Dorset station, on the line of railroad owned and operated by the defendant, which extends from the city of Youngstown to Ashtabula. The plaintiff, at the time he was injured, was a conductor of a passenger train, which was run between Youngstown and Andover, the latter place being a station on the line between Youngstown and Ashtabula, at which there was a junction of the line of railroad aforesaid with the line extending northeastward to Jamestown, Franklin and Oil City, in Pennsylvania. The plaintiff, as such conductor, took charge of his train every morning at Andover, ran to Youngstown, and in the evening returned, in charge of the same train, to Andover, when his actual work for the day ended. Plaintiff, at the time, and for a long time, twenty years, prior to the accident lived at the village of Ashtabula, and during all of that time, and three years more, was in the employ of the defendant; the last five years as a first-class passenger conductor, and before that as a through and way freight conductor.'

It was the custom of the plaintiff, while he was engaged on the run aforesaid, after he arrived in the evening at Andover and registered there the arrival of his train, to take a train, made up at that junction from parts of his train that had come from Youngstown and parts of other trains which had come in from Oil City, Franklin, Jamestown and other points, which train, being a mixed freight and passenger train, thus made up was destined to the village of Ashtabula, in order to ride to his home in the latter place, and he usually rode in the caboose of such mixed train, and was riding in a combination car carrying employees and passengers, when he was injured. In order that he might so ride on the latter and other trains from Andover to his home and back to Andover, the next morning, so as to take charge there of his own train for the run to Youngstown and return to Andover and from thence to his home in Ashtabula, he was provided with a monthly pass by the superintendent of the division of the road to which his run belonged, which pass was known as an employee's pass, and authorized him to ride on any of the trains of the company to and from his work. All conductors, of the same grade, in the employ of the company, were given, each month, similar passes, to enable them to ride free from and to their work in connection with their respective trains; and there was no charge made or exacted for such passes and no deduction made from their monthly wages or pay therefor; but such passes were, in all respects, free passes.

The plaintiff, after he went upon the train which was destined for Ashtabula, the train on which he was injured, had no duties to perform

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on that train, unless directly ordered on duty by some superior officer of the company; but his employment was by the month, and was continuous; that is, he was at all times, both day and night, subject and liable to be ordered upon duty by the trainmaster or other proper superior officer of the company, on any train, at any place and at any time, day or night.

On the night plaintiff received his injuries, he boarded the Ashtabula train, known as train No. 37, at about 8 o'clock P. M., and took a seat in a combination car. Train No. 37 was followed by a freight train, known as No. 2nd 19. Soon after No. 37 left Andover, it broke in two, and the following train ran into and collided with the rear part of No. 37, which had become detached and thereby the plaintiff and others were injured.

There are several grounds and specifications of negligence upon the part of the company and its employees stated in the petition, but there was no evidence given upon the trial in support of or in any manner tending to prove any of them, except the negligence of Van Epps, who was the conductor of train No. 37, on which plaintiff was riding and injured; and that negligence of Van Epps, which consisted in omitting to properly cause the following train, No. 2nd 19, to be flagged; according to the rule of the company, in time to have caused it to stop before striking the detached portion of No. 37, which had broken off, was admitted by defendant upon the trial.

So, that the case was tried and submitted to the jury, alone, upon the admitted negligence of Van Epps, as such conductor, in the respects above mentioned, and his disregard of the rules of the defendant relating to such cases, which rules were shown to be fully adequate to prevent such accidents, if complied with by those whose duty it was to observe and obey them. That fact was not in any way questioned or controverted.

The defendant company requested the court to charge the jury in writing each of the following propositions, separately, each from all the others, before the argument to the jury.

I.

If the jury shall find, from the evidence in the case, that Bycraft, the plaintiff, at the time he was injured, was in the employ of the defendant company as a conductor; that he was paid the same wages for his services as the other servants of the defendant, engaged in the same or similar service; that he was authorized and permitted by defendant company to ride free, on a pass, on its trains from Andover to his home in Ashtabula, and back to Andover in the morning, to take charge of his own train; that he paid no fare for thus riding, and no deduction was made from his

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monthly pay, on account of such carrying him from his work to his home and return to his work; and that he was so riding on train No. 37, and being so carried at the time he was injured, then the court charges the jury, that if he was injured by reason of the negligence of those in charge of and operating train second 19, or those operating the train on which he was being so carried, he cannot recover against the defendant company in this action.

II.

If the jury shall find, from the evidence in the case, that plaintiff and the conductors and engineers of the trains, Nos. 37 and second 19, which came into collision by which plaintiff was injured, were all in the employ of the defendant company, as such conductors and engineers, and all engaged in operating engines and trains on defendant's railroad at the time plaintiff was injured; then the court charges the jury that such conductors and engineers of said colliding trains and the plaintiff were fellow-servants and co-employees; and that if the jury shall find from the evidence that such collision was caused solely by the negligence of one or more of such employees of said colliding trains, then the plaintiff is not entitled to recover against the defendant in this case.

III.

If the jury shall find, from the evidence in the case, that it was no part of the contract of employment between the plaintiff and the defendant company, express or implied, that the plaintiff should be carried or transported by the defendant from Andover to Ashtabula, or from Ashtabula to Andover, to or from his work, and that plaintiff, at the time he was injured, was riding on and by virtue of a free pass, issued to him as and because he was an employee of defendant company, without charge or any deduction from his wages therefor, but as an incident to his employment by the defendant; then the court charges the jury that he was not, during such passage from Andover to Ashtabula, at and during which he was injured, a passenger, but was merely, during all of said time, while on the train of defendant—an employee of defendant, and co-employee of the conductors, engineers and brakemen of trains Nos. second 19 and No. 37, by the collision of which he was injured; and in such case and circumstances, he is not entitled to recover in this case, for or on account of the negligence, if you find that there was negligence, of any such conductors, engineers or brakemen of said trains.

IV.

If the jury shall find, from the evidence in the case, that the plaintiff, as an incident of his employment, held a free pass, issued to him by the defendant company, giving him the right to ride on train No. 37, from

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Andover to Ashtabula, on the evening and at the time he was injured, without payment of any fare therefor, and without any deduction from his wages on account thereof; that he was thus riding on said train No. 37 at the time he was injured by a collision of train No. second 19 with train No. 37, while on his way from Andover to Ashtabula, in consequence of the negligence of the conductor or engineer of said train No. second 19, or of the conductor or engineer of said train No. 37, upon which he was riding, or the joint negligence of any or all of them, then such negligence was that of a fellow-servant or fellow-servants, and for such negligence plaintiff is not entitled to recover in this action.

V.

If the jury shall find, from the evidence in the case, that the plaintiff was riding on train No. 37, from Andover to Ashtabula, at the time he was injured, on a free pass issued to him by the defendant company, as one of its employees, without any payment of fare, or charge or deduction from his wages therefor, or on account thereof; and that while so riding he was injured, in consequence of the negligence of any or all the employees of defendant then in charge of or operating train No. second 19, or of any or all of such employees in charge of or operating train No. 37—upon which he was riding, or the negligence of defendant's train despatcher, or of any telegraph operator at any of the defendant's stations, then the plaintiff is not entitled to recover in this action against the defendant.

VI.

If the jury shall find, from the evidence in the case, that the plaintiff, for some time prior to and at the time he was injured, was in the employ of the defendant company, as a conductor, that his home was during such time in Ashtabula; that it was his custom to ride on one of defendant's trains from Andover to his home after the arrival of his own train at Andover in the evening, and back from Ashtabula to Andover in the morning to take charge of his own train; that he was thus transported to and from his home as an employee of the defendant, and because he was such, free of any charge therefor, on a pass or otherwise; that at the time he was injured he was being thus carried from Andover to his home in Ashtabula; and that he was injured by reason of the negligence of other employees of defendant company, who were at the time in charge of and operating one or both of the trains which came into collision, by which plaintiff was injured; then the plaintiff is not entitled to recover in this action, and a verdict should be returned for the defendant.

VII.

If the jury shall find, from the evidence in the case, that after the plaintiff arrived at Andover with the train, of which he was the conductor,

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and from that time until his duties in connection with said train began again, that is: on his way to his home at Ashtabula, on the evening he was injured, while at home and on his way returning to take charge of his train, he was at all times subject to the orders of defendant, and under his employment subject to be ordered or directed to perform service for the defendant on or connected with any other train; and the jury shall find that he was during such time, while so subject to such orders or directions of defendant, injured by reason, solely, of the negligence of one or more of the employees of defendant in charge of one or both of the trains by the collision of which he was injured, then he was not a passenger, when injured, and he is not entitled to recover in this action.

The court refused to charge each separately or all or any of said written propositions before the arguments to the jury, to which refusal the defendant excepted.

Whereupon the counsel for the defendant requested the court to give in his charge, to begin after argument, to the jury each of the following requests or propositions, separately, each from the others, as the law applicable to the case.

I.

If the jury shall find, from the evidence in the case, that Bycraft, the plaintiff, at the time he was injured, was in the employ of the defendant company, as a conductor; that he was paid the same wages for his services as the other servants of the defendant, engaged in the same or similar service; that he was authorized and permitted by defendant company to ride free, on a pass, on its trains from Andover to his home in Ashtabula, and back to Andover in the morning, to take charge of his own train; that he paid no fare for thus riding, and no deduction was made from his monthly pay, on account of such carrying him from his work to his home and return to his work; and that he was so riding on train No. 37, and being so carried at the time he was injured, then the court charges the jury, that if he was injured by reason of the negligence of those in charge of and operating train second 19, or those operating the train on which he was being so carried, he cannot recover against the defendant company in this action.

II.

If the jury shall find from the evidence in the case, that the plaintiff and the conductors and engineers of the trains, Nos. 37 and second 19, which came into collision by which plaintiff was injured, were all in the employ of the defendant company, as such conductors and engineers, and all engaged in operating engines and trains on defendant's railroad at the time plaintiff was injured; then the court charges the jury that

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such conductors and engineers of said colliding trains and the plaintiff were fellow-servants and coemployees; and that if the jury shall find from the evidence that such collision was caused solely by the negligence of one or more of such employees of said colliding trains, then the plaintiff is not entitled to recover against the defendant in this case.

III.

If the jury shall find, from the evidence in the case, that it was no part of the contract of employment between the plaintiff and the defendant company, express or implied, that the plaintiff should be carried or transported by the defendant from Andover to Ashtabula, or from Ashtabula to Andover, to or from his work, and that plaintiff, at the time he was injured, was riding on and by virtue of a free pass, issued to him as and because he was an employee of defendant company, without charge or any deduction from his wages therefor, but as an incident to his employment by the defendant; then the court charges the jury that he was not, during such passage from Andover to Ashtabula, at and during which he was injured, a passenger, but was merely, during all of said time, while on the train of defendant, an employee of defendant, and co-employee of the conductors, engineers and brakemen of trains No. second 19 and No. 37, by the collision of which he was injured; and in such case and circumstances, he is not entitled to recover in this case, for or on account of the negligence, if you find that there was negligence, of any such conductors, engineers or brakemen of said trains.

IV.

If the jury shall find from the evidence in the case, that the plaintiff, as an incident of his employment, held a free pass, issued to him by the defendant company, giving him the right to ride on train No. 37, from Andover to Ashtabula, on the evening and at the time he was injured, without payment of any fare therefor, and without any deduction from his wages on account thereof; that he was thus riding on said train No. 37 at the time he was injured by a collision of train No. second 19 with train No. 37, while on his way from Andover to Ashtabula, in consequence of the negligence of the conductor or engineer of said train No. second 19, or of the conductor or engineer of said train No. 37, upon which he was riding, or the joint negligence of any or all of them, then such negligence was that of a fellow-servant or fellow-servants, and for such injuries plaintiff is not entitled to recover in this action.

V.

If the jury shall find, from the evidence in the case, that the plaintiff was riding on train No. 37, from Andover to Ashtabula, at the time he was injured, on a free pass issued to him by the defendant company,

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as one of its employees, without any payment of fare, or charge or deduction from his wages therefor, or on account thereof; and that while so riding he was injured, in consequence of the negligence of any or all the employees of defendant then in charge of or operating train No. second 19, or of any or all of such employees in charge of or operating train No. 37, upon which he was riding, or the negligence of defendant's train despather, or of any telegraph operator at any of the defendant's stations, then the plaintiff is not entitled to recover in this action against the defendant.

VI.

If the jury shall find, from the evidence in the case, that the plaintiff, for some time prior to the time he was injured, was in the employ of the defendant company, as a conductor, that his home was during such time in Ashtabula; that it was his custom to ride on one of defendant's trains from Andover to his home after the arrival of his own train at Andover in the evening, and back from Ashtabula to Andover in the morning to take charge of his own train; that he was thus transported to and from his home as an employee of the defendant, and because he was such, free of any charge therefor, on a pass or otherwise; that at the time he was injured he was being thus carried from Andover to his home in Ashtabula; and that he was injured by reason of the negligence of other employees of defendant company, who were at the time in charge of and operating one or both of the trains which came into collision, by which plaintiff was injured; then the plaintiff is not entitled to recover in this action, and a verdict should be returned for the defendant.

VII.

If the jury shall find, from the evidence in the case, that after the plaintiff arrived at Andover with the train, of which he was the conductor, and from that time until his duties in connection with said train began again, that is; on his way to his home at Ashtabula, on the evening he was injured, while at home and on his way returning to take charge of his train, he was at all times subject to the orders of defendant, and under his employment subject to be ordered or directed to perform service for the defendant on or connected with any other train; and the jury shall find that he was during such time, while so subject to such orders or directions of defendant, injured by reason, solely, of the negligence of one or more of the employees of defendant in charge of one or both of the trains by the collision of which he was injured, then he was not a passenger, when injured, and he is not entitled to recover in this action.

Each of which requests the court refused to give in charge to the jury, except as hereinafter appears, and defendant duly excepted to such refusal.

Whereupon, when arguments of counsel to the court and jury were concluded, the court charged the jury, in writing, on the issues joined, as follows:

JOHNSTON, J.

Gentlemen of the Jury: Plaintiff says that the defendant is a railway company legally incorporated, and was such on July 8, 1892, and was operating a line of railroad from the city of Youngstown, Mahoning county, Ohio, to Ashtabula, in Ashtabula county, Ohio, and that he had been employed prior to July 8, by the defendant as a conductor from Youngstown to Andover, in Ashtabula county; he says that on that day his passenger train was due at Andover at 8 o'clock, P. M.; that his family then resided and had for some time prior thereto resided at Ashtabula; that, when he arrived at Andover, his duties towards the defendant ended until the next morning, when he started with his train for Youngstown; that on the night of July 8, 1892, after arriving at Andover, by permission of the conductor of freight train No. 37, and also the permission of the general superintendent of the defendant company, he got into the caboose of said freight train to ride to Ashtabula; that it was known as a first-class train, and that train No. 19 was known as a second-class freight train; by the rules of the company, No. 37, being what is called as a first-class freight train had right of way over No. 19; that train No. 37 was due at Andover at or about 7:30 P. M., and was scheduled to leave Andover at about 8 o'clock, and that No. 19 left Andover a few minutes after No. 37 left, the exact time he being unable to state; that at and near Dorset, the second station north from Andover, train No. 19 collided with train No. 37, smashing the caboose and wrecking a number of other cars and injuring the plaintiff; that the time No. 37 left Andover was known to the train despatcher of the defendant company, and that the time that No. 19 left was also well known; that the said despatcher was grossly negligent and careless in permitting said No. 19 to follow No. 37 so closely as it did, and he was negligent in not notifying No. 37, or its employees, of the fact of No. 19 following so closely; that the train despatcher issued an order to the telegraph operator at Leon station, between Dorset and Andover, to be delivered to the conductor and engineer of train No. 19, to run close to No. 37; that the telegraph operator at Leon negligently and carelessly failed to flag No. 19 against No. 37; that No. 37, just before it arrived at Dorset, broke in two, and that No. 19, having been run so negligently and carelessly so close to No. 37, collided with the rear end of No. 37.

He alleges that he was a passenger on this train, and that it was the duty of the defendant company to carry him safely from Andover to Ashtabula; that said No. 19, by reason of the gross negligence of the conductor and engineer, was running at a high rate of speed when he, the plaintiff, discovered that a collision was about to occur, attempted to go

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off the train, he was caught between the rear door of the caboose and baggage car, and thrown from there to the side of the track, and that by reason of the gross carelessness and negligence of the defendant, as aforesaid, he was injured in the back of his head, his left side in the region of his short ribs, and also at the point of the hips on the right side, he was severely contused in the left knee and face, sustained severe injury in the lumbar region of the back, and sustained a severe concussion of the spine and of the brain; that he has sustained loss of sensation in the lower extremities, and was so severely injured that they do not properly perform their functions, and that he has suffered great pain in the back, left side, heart and in his head, and also sustained a curvature of the spine in the lumbar regions; that it has permanently changed the tissues of his spinal chord, from which he will never recover; and that his injuries are permanent in their character, and, as a result, he has become paralyzed in the lower extremities, so that he will never be able to perform any labor as long as he lives, and will suffer pain as long as he lives.

He alleges that at the time he received his injuries he was earning and able to earn one hundred dollars a month. He says by reason of his injuries so sustained he has been damaged in the sum of \$75,000, for which he asks judgment.

To this petition defendant answers and says, that it admits that it is a corporation as alleged, and at the time stated it was operating a line of railway, as mentioned in the petition, in the manner therein stated; that on July 8, 1892, and for a long time prior thereto plaintiff was in its employ as a conductor; admits his train was due at Andover at about 8 o'clock, P. M., as stated; admits that the plaintiff resided with his family at Ashtabula; that on the night of July 8, 1892, the plaintiff, after arriving at Andover, by permission of the conductor of train No. 37, got into the caboose of said train No. 37, to ride to Ashtabula; that said train No. 37 was due at Andover about the time stated and scheduled to leave Andover about the time stated in the petition; that train No. 19 left Andover after train No. 37 had left the station, and that near Dorset station trains Nos. 19 and 37 came into collision and thereby a number of cars were injured; the caboose was wrecked and the plaintiff was injured; but not to the extent alleged, and it admits that at the time the plaintiff was injured he was earning about the sum of one hundred dollars a month. Defendant denies that it was guilty of any negligence or want of care which caused the collision of said train and injury of plaintiff, or guilty of any negligence in any respect, as alleged or otherwise; and denies that the plaintiff, at the time he was injured, occupied the relation of passenger on this train; and denies each and every other allegation, statement and averment in plaintiff's petition contained, not specifically admitted.

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Further answering the defendant avers that at the time plaintiff was injured he occupied the relation of an employee of the defendant, and was using one of its, defendant's, trains in order to travel from his place of work to his home. That at the said time he was in no sense a passenger of the defendant on this train. It says if the collision of defendant's trains was caused by any negligence, it was that of the conductor and engineer of a train which collided, who were coemployees of the plaintiff by the defendant company, and the result of whose negligence it is not in law liable to the plaintiff.

The plaintiff replies to this answer and says, that he denies that at the time he was injured he occupied the relation of employee to the defendant, but was using one of its, defendant's, trains in order to travel from his place of work to his home, and denies that at that time he was not in any sense a passenger of defendant on its train; and denies that the conductor and engineer of said train were coemployees with him, and for the result of whose negligence the defendant is now in law liable to the plaintiff.

This is a general statement of the claims of the respective parties, as they appear from the pleadings and by the allegations, averments, admissions and denials therein.

The pleadings will be before you when you retire and can be examined by you, if deemed necessary, for the purpose of ascertaining more fully and distinctly the claims of the respective parties, but these pleadings are not evidence and must not be so considered by you, except that any admissions that they may contain should be regarded by you.

From this statement you will observe that the parties are at issue upon several questions which are presented for your consideration and determination. These are, whether or not the defendant was guilty of negligence in the particulars complained of in the petition or either of them, and if so, whether or not this negligence was the direct and proximate cause of the injury to the plaintiff, of which he complains, and whether the plaintiff himself was in the exercise of ordinary care at that time, and also whether the plaintiff was injured in the manner and to the extent alleged by him. There are other questions in the case aside from these, to which your attention will be called, which it will be your duty to consider. There being no evidence of negligence on the part of the train despatcher, that question need not be considered by you.

Taking up these questions, then, you will proceed to consider and determine whether the defendant was guilty of negligence through the conductor of train No. 37, as alleged by the plaintiff.

If you find it was not thus negligent, you need not enquire further, but should return a verdict for the defendant. If you find that it was thus negligent, then you will proceed to enquire and determine whether or not this negligence so found by you was the direct and proximate

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cause of the injury to the plaintiff, of which he complains. If you find it was not such cause, you need not enquire further, but should return a verdict for the defendant. If you find it was such cause, then you will proceed to ascertain and determine whether or not the plaintiff was in the exercise of ordinary care at that time. If you find that he was not, and that this failure on his part contributed to cause his injury, he cannot recover. If you find that he was in the exercise of such care, then you will proceed to ascertain and determine the extent of the injuries which he has sustained, and also to ascertain and determine whether or not the injuries so sustained were caused by and were the result of negligence and want of care on the part of fellow-servants of the plaintiff in this action.

It is an admitted fact in the case that the defendant was a corporation, organized under the laws of the state of Ohio, and that at the time plaintiff received his injury it was operating a line of railway in this state, as claimed by the plaintiff. It is also admitted that, on July 8, 1892, and for a long time prior thereto, the plaintiff was in its employ as a conductor. It is admitted that his train was due at Andover at or about 8 o'clock, P. M., as alleged by plaintiff, and that the plaintiff resided with his family at Ashtabula. It is also admitted that, on the night of July 8, 1892, plaintiff, after arriving at Andover, by permission of the conductor of train No. 37, got into the caboose of train No. 37 to ride to Ashtabula. It is also admitted that this train No. 37 was due at Andover at or about the time mentioned, and to which your attention has been called. And that it was scheduled to leave Andover at about the time stated by the plaintiff in his petition.

It is averred that train No. 19 left Andover after train No. 37 had left that station, and it is admitted that at or near Dorset station trains No. 19 and No. 37 came into collision, and that by reason of this collision plaintiff was injured. And it is also admitted that at that time he was earning about one hundred dollars a month, but, as already stated, the extent to which plaintiff was injured, as alleged by him, is denied by the defendant, so that upon many of the matters alleged in the petition there is no dispute and no issue is raised, but the parties are distinctly at issue as to whether or not the plaintiff was a passenger on train No. 37 at the time he received his injury, and they are also at issue distinctly upon the proposition as to whether or not the defendant was negligent, as to whether or not, if so negligent, such negligence was the proximate cause of plaintiff's injuries, and whether or not he was in the exercise of proper care when injured, and whether or not the plaintiff was a fellow-servant and coemployee of the employees of train No. 37 at the time he received his injury.

Upon this last question I say to you, as a matter of law, that if you find that plaintiff was injured by reason of the negligence and want of

care on the part of the conductor of train No. 37, and you also find that the plaintiff, at the time he received his injury was upon that train, with the consent, permission and knowledge of the defendant, and with the consent, permission and knowledge of the conductor of this train No. 37, but that at that time he was in the discharge of no duty incident to his employment, and was not engaged in discharging any of his duties as a conductor upon that road, or any duty upon that train, and was merely riding from Andover to his home at Ashtabula, with this consent, knowledge and permission on the part of the defendant and of the conductor, that the negligence of the conductor in charge of train No. 37 would be the negligence of the defendant, and would not be the negligence of a co-employee or fellow servant, so as to defeat a recovery in this action, provided you find the plaintiff otherwise entitled to recover. If you have found the plaintiff to have been thus upon this train, then it became and was the duty of the defendant to exercise towards him ordinary care in the running and operating of that train, and this would be the degree of care and the degree only which was incumbent upon the defendant by reason of the relation which existed from the situation of the parties, and the relation they sustained toward each other at that time. If the defendant failed and neglected to exercise that degree of care towards the plaintiff, and for his safety, for such failure the defendant would be liable, provided the plaintiff was in the exercise of proper care on his own part, and if this conductor of train No. 37 failed and neglected to exercise towards the plaintiff that degree of care, and by reason of this failure the plaintiff was injured, the defendant would be liable therefor.

By ordinary care as here used is meant such care as ordinarily prudent persons ordinarily exercise or are accustomed to exercise under the same or similar circumstances, and in conducting and carrying on the same or similar business, and this would apply to both plaintiff and defendant in this action.

If you have found that the defendant was negligent in running and operating train No. 37, and find that it did not exercise towards the plaintiff ordinary care for his safety, and that by reason of such failure, and as a direct and proximate result thereof, the plaintiff sustained his injuries, and have also found that at the time he received his injury, he was upon this train, with the knowledge, permission and consent of the defendant and said conductor, but was discharging none of the duties incident to his employment at that time, and discharging no duty required of him by the defendant on that train or otherwise, and was in the exercise of ordinary care himself, then the plaintiff would be entitled to recover, even though you may find at that time the relation of master and employee existed between the defendant and the plaintiff.

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Upon these questions the burden of proof is upon the plaintiff, and this makes it incumbent upon him to produce a preponderance of the testimony in support of the propositions mentioned, and unless he has produced it he would not be entitled to recover. If he has produced it then he is entitled to your verdict.

As to the extent of the injuries, the burden of proof is also upon the plaintiff, and this also makes it incumbent upon him to produce a preponderance of the evidence as to the injuries sustained, and the extent thereof, as well as the same being the direct and proximate result of the negligence of the defendant.

In order to determine these questions you should carefully consider all of the testimony which is presented here in connection with the admissions to which your attention has been called, as well as the admissions which have been made in open court during the progress of the trial of this case in regard to any of the matters which are in controversy.

Having considered it all, ascertain the facts that are established by this testimony by a preponderance of the evidence produced, and according to these facts the rules here given in charge, you will report the conclusion at which you have arrived by the verdict which you may render.

If your verdict is for the defendant, say so in general terms. If for the plaintiff, you should so state, and also incorporate in your verdict the amount which you may find he is entitled to recover, an amount that would be sufficient to compensate him for the damages actually sustained by him, directly resulting from the negligence of the defendant. This would include the pain which the plaintiff has suffered, and the pain that he will continue to suffer if his injuries are of such a character as to cause him pain in the future. His diminished capacity to earn money from the time he received his injuries until the present, and his diminished capacity to earn money in the future, if you find his injuries are of such a character as to diminish his capacity to earn money in the future. And you may also include any expense actually and necessarily incurred by him in consequence of the injuries received which have been proven in this case. He is entitled, if entitled to recover at all, to be made whole; more than that would be unjust to the defendant; less would be unjust to the plaintiff.

The defendant excepts to the refusal of the court to charge any of the written propositions submitted to the court before argument of the case, being propositions numbered from one to seven, inclusive.

The defendant also excepts to the following portion of the charge as given: "I say to you as a matter of law, that if you find that plaintiff was injured by reason of the negligence and want of care on the part of the conductor of train No. 37, and you also find that the plaintiff, at the time he received his injury, was upon that train with the consent, permission and knowledge of the defendant, and with the consent, permis-

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sion and knowledge of the conductor of this train No. 37, but at that time, he was in the discharge of no duty incident to his employment and was not engaged in discharging any of his duties as a conductor upon that road, or any duty upon that train, and was merely riding from Andover to his home at Ashtabula, with this consent, knowledge and permission on the part of the defendant and of the conductor, that the negligence of the conductor, in charge of train No. 37, would be the negligence of the defendant and would not be the negligence of a coemployee or fellow-servant, so as to defeat a recovery in this action, provided you find the plaintiff otherwise entitled to recover."

The defendant also excepts to the following part of the charge: "If you have found the plaintiff to have been thus upon this train then it became and was the duty of the defendant to exercise towards him ordinary care in the running and operating of that train, and this would be the degree of care and the degree only which was incumbent upon the defendant by reason of the relation which existed from the situation of the parties and the relation they sustained toward each other at that time. If the defendant failed and neglected to exercise that degree of care towards the plaintiff, and for his safety, for such failure the defendant would be liable, provided the plaintiff was in the exercise of proper care on his own part, and if this conductor of train 37 failed and neglected to exercise towards the plaintiff that degree of care, and by reason of this failure the plaintiff was injured, the defendant would be liable therefor."

The defendant also excepts to the following portion of the charge: "If you have found that the defendant was negligent in running and operating train No. 37, and find that it did not exercise towards the plaintiff ordinary care for his safety, and that, by reason of such failure, and as a direct and proximate result thereof, the plaintiff sustained his injuries, and have also found that at the time he received his injury he was upon this train, with the knowledge, permission and consent of the defendant and said conductor, but was discharging none of the duties incident to his employment at that time, and discharging no duty required of him by the defendant on that train or otherwise, and was in the exercise of ordinary care himself, then the plaintiff would be entitled to recover, even though you may find at that time the relation of master and employee existed between the defendant and the plaintiff."

The defendant also excepts to the following portion of the charge: "And you may also include any expense actually and necessarily incurred by him in consequence of the injuries received, which have been proven in this case."

The defendant also excepts to the refusal of the court to charge or instruct the jury in any respect as to the relation that existed between plaintiff and other servants of the defendant company in charge of the trains which collided.

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Thereupon, after verdict for the plaintiff, and within three days, and before judgment, the defendant duly filed its motion for a new trial, which came on for hearing on the 10th day of February, 1894, was on that day heard, and was overruled by the court, and judgment entered on the verdict of the jury, to which defendant duly excepted.

FIRE INSURANCE

[Fayette Common Pleas, March Term, 1891.]

*DUN & CO. v. GERMANIA FIRE INSURANCE CO.

1. ACTION BY PARTNERSHIP ON POLICY—PROOF REQUIRED.

In an action by a partnership to recover insurance the burden is on the plaintiff to prove, that it is a partnership doing business in Ohio; that at the time of the loss and also when the policy was given the property belonged to the partnership; that the same was injured or destroyed by fire as claimed, and the amount of loss or injury; that plaintiff performed all the conditions of said policy, or that the defendant waived such as were not performed by plaintiff sixty days before bringing suit.

2. DISSOLUTION OF FIRM MAY BE EXPRESS OR IMPLIED.

A partnership at will may be dissolved by agreement of partners, and it is immaterial whether it be done by an express agreement, or by acts and conduct of its members, or one of them, showing an intention, with acts carrying it into effect, to terminate the relation.

3. FACTS NOT OPERATING AS DISSOLUTION OF FIRM.

The fact that one member of a firm, organized for the purpose of carrying on a banking business, purchased in good faith goods for the firm in consideration for and in satisfaction of a judgment held by the firm against the owner thereof, without consulting with the other member or getting his consent thereto, and kept the store, containing these goods as a stock, open as a going concern, and sold goods from time to time, will not operate as a defense of dissolution of the firm.

4. REMOVAL OF PARTNER FROM STATE NOT DISSOLUTION.

The fact that one member of a firm went out of the state to live and gave no further personal attention to the firm business, but left it to the resident partner, does not in itself work a dissolution thereof.

5. SUFFICIENT NOTICE OF LOSS.

A notice of loss under a policy of insurance immediately after a fire, or as soon as it can be done with reasonable diligence, to the agent of the company at the place where the fire occurred, or with such diligence causing notice of the loss to be brought to the knowledge of the company, is a sufficient compliance with the condition requiring notice of loss to be given to the company.

*The judgment in this case was affirmed, with order of remittitur of excess over \$4,200, by the circuit court, November term, 1891, and by the Supreme Court without report, 52 Ohio St., 639.

*In the Supreme Court, Craighead & Craighead, and Mills Gardiner, for plaintiff in error, cited: Mehirin v. Stone, 37 Ohio St., 50; Home Ins. Co. v. Lindsay, 26 Ohio St., 348; Hallis v. Insurance Co., 65 Iowa, 454; Barre v. Insurance Co., 76 Iowa, 299; Thompson v. Insurance Co., 136 U. S. R., 299; Weed v. Insurance Co., 116 N. Y., 116, 117; Lohnes v. Insurance Co., 121 Mass., 439; Bush v. Westchester Co., 63 N. Y., 531; Bowlin v. Hekla Fire Ins. Co., 36 Minn.; Harkiss v. Rockford Ins. Co., 70 Wis., 1; Walsh v. Hartford Fire Ins. Co., 73 N. Y., 5; Youngstown v. Moore, 30 Ohio St., 133; Insurance Co. v. Sorsby, 60 Miss., 302; Weed v. Insurance Co., 116 N. Y., 116, 117; Barre v. Insurance Co., 76 Iowa, 609; Van Allen v. Insurance Co., 64 N. Y., 469; Merseran v. Insurance Co., 66 N. Y., 274; Wood on Insurance, Sec. 397, p. 655; May on Insurance, Sec. 138, A.

Fay's Commercial Papers.

6. PROOFS OF LOSS—WAIVER BY ACTS.

An insurance company must not, by its acts or the acts of its authorized agents, within the scope of their duties and authority, do anything to throw the insured off of his guard, and cause him to believe, as any reasonable man under similar circumstances would believe, that proofs of loss are not wanted by the company or they will be held to have waived such proofs.

7. ACTS OF ADJUSTER BIND THE COMPANY.

An adjuster, employed by an insurance company to act for it in settling a loss, is the agent of the company and all that he does within the scope and line of his employment and duties binds the company.

8. PROOFS OF LOSS MAY BE WAIVED.

The requirement of preliminary proofs of loss is a formal condition, inserted in the policy of insurance solely for the benefit of the insurer, and it may waive such proofs in whole or in part, either by direct action of the insurer, or his general agent by virtue of his authority and such waiver may be express or implied.

9. ACTS WHICH DO NOT CONSTITUTE WAIVER.

Mere silence on the part of an insurance company, or sending agents to make inquiry or investigation into the matter of the loss, or an attempt to compromise, do not amount to a waiver of proofs of loss.

10. ACTS AMOUNTING TO WAIVER.

If an insurance company, by its adjuster, proceeds to investigate a loss on its merits, and by what it does causes the insured to believe, and a man of ordinary judgment under the circumstances would have so believed, that it was only the amount of loss in dispute, and nothing else, that will amount to a waiver of proofs of loss.

11. DENIAL OF ALL LIABILITY A WAIVER.

A denial of all liability, on the ground that the loss is not within the policy, or that the policy is void, is a waiver of the clause requiring proofs of loss.

12. EVIDENCE BEARING ON WAIVER.

Where an insurance company sent its adjuster to the place of loss to investigate it, and he assisted in selecting two appraisers to estimate the loss, and the appraisers made a report thereof, and the adjuster and assured agreed as to the loss on other property under the policy, may be considered in determining whether or not proofs of loss were waived.

13. COMPANY CANNOT RECALL WAIVER OF PROOFS.

An insurance company cannot recall, or reclaim a waiver of proofs of loss and demand or insist upon such proofs.

Vol. 1; James v. Stockey, 1 Wash., 330, 331; May on Insurance, Vol. 1, Sec. 137; A; May on Insurance, Sec. 126. Vol. 1; Greene v. Insurance Co., 91 Pa., 387; Clevenger v. Insurance Co., 9 Ins. Law Jour., 129; Allen v. Ogden, 1 Wash., 174-178; Marvin v. Insurance Co., 85 N. Y., 278; Quinlan v. Insurance Co., 133 N. Y., 366; Walsh v. Insurance Co., 73 N. Y., 5; Cleaver v. Insurance Co., 65 Mich., 527; Hawkins v. Insurance Co., 70 Wis., 1; Greenleaf on Evidence, 114, p. 158; Francis v. Edwards, 77 N. C., 271; Golbreath v. Cole, 61 Ala., 139; Central Branch N. P. R. R. v. Bertman, 22 Kan., 639; Henkle v. McClure, 32 Ohio St. 202; Mehrin v. Stone, 37 Ohio St., 49; Home Ins. Co. v. Lindsey, 26 Ohio St., 348; Toland v. Lutz, 1 Circ. Dec., 584; Judge v. Brasswell, 13 Bush., 67; Toot v. Duncan, 45 Miss., 48; Gray v. Ward, 18 Ill., 32; Bliss, Life Ins., Sec. 355-8; Woods, Ins., p. 728; Ins. Co. v. Parisot, 35 Ohio St., 40; Aetna Ins. Co. v. Reed, 33 Ohio St., 283; Farmers Ins. Co. v. Frick, 29 Ohio St., 466; Bliss on Life Ins., 267, p. 446; Bryan v. Rock Island Co., 63 Iowa, 464; Fitzgerald v. McCarty, 55 Iowa, 702; Porter v. Knight, 63 Iowa, 365; Sterling Wrench Co. v. Amstutz, 50 Ohio St., 489; Ford v. Osborn, 45 Ohio St., 3.

*Hidy & Patton, for defendant in error, cited: Wood on Insurance, p. 753, Sec. 432; Pettingill v. Hanks, 9 Gray, 169; Dyer v. Insurance Co., 54 Me., 457; Rev. Stat., Sec. 4987; 7 Am. and Eng. Ency. Law, 1020; Clark v. Insurance Co., 7 Mo. App., 77; Wood on Insurance, p. 168, Sec. 86; Wood on Insurance, p. 398,

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14. DAMAGES FIXED BY APPRAISERS ARE CONCLUSIVE.

The damages fixed by appraisers and returned in their award are conclusive and cannot be opened up upon submission to a jury in an action for loss upon a fire policy.

15. APPRAISEMENT—DEMAND FOR.

A letter from an insurance company to assured, upon receipt of notice of loss, demanding a compliance with the conditions of the policy in regard to notice of loss, the amount, etc., and reciting that "in case differences shall arise" touching such loss, the matter shall be submitted to appraisers, does not amount to a demand for appraisal.

16. WAIVER OF PROOF DOES NOT MAKE CLAIM DUE AT ONCE.

An insurance company is entitled to the sixty days limitation on bringing suits for loss upon a policy of insurance, to investigate the claim, and waiver of proof of loss does not make the claim due at once unless the company notifies assured that it will not pay in any event.

17. SIXTY DAYS LIMITATION—SUIT WITHIN FAILS.

If an insured brings suit within sixty days of presenting notice and proofs of loss he must fail unless the company deny liability on the policy, when an action may be commenced without waiting such time.

AMENDED PETITION.

The plaintiff is a partnership formed for the purpose of doing business in the state of Ohio, and are engaged in business at Sabina, Ohio.

The defendant is a corporation duly organized under the laws of the state of New York, and on January 23, 1889, had performed all the conditions and requirements of the laws of Ohio in that regard, and was on said day, and still is, duly authorized to insure against loss or damage by fire in the state of Ohio. On January 23, 1889, at the city of Washington, Fayette county, Ohio, the plaintiff being the owner of the following described property, to-wit: A stock of drugs, medicines, oils, paints, glassware, dye-stuffs, fancy goods, liquors, and cigars, tobacco, stationery and notions, toys, pictures and their frames, guns, hunters' outfits and shells, barroom furniture and fixtures, consisting chiefly of side-board, mirror, counter and cooler; also, store furniture and fixtures, consisting chiefly of show-cases, iron safe, counters, tables, mirrors, prescription case, shelf bottles and case, soda fountain and fixtures, and all contained in the first story and basement of a two story brick building, occupied by said plaintiff as a wholesale and retail drug store, situate on the west corner of Court and Main streets, in Washington C. H., Ohio, in consideration of the premium of fifty dollars paid, defendant, by its policy

Sec. 502; Wood on Insurance, p. 715, Sec. 417; Wood on Insurance, p. 724, Sec. 419; Wood on Insurance, Secs. 420 and 421; Westlake v. Insurance Co., 14 Barb. 206; Insurance Co. v. Harmer, 2 Ohio St., 476; O'Neil v. Insurance Co., 3 Conn., 122; Tyler v. Insurance Co., 9 How., 390; Francis v. Insurance Co., 6 Cow., 404; Insurance Co. v. Tyler, 16 Wend., 402; Insurance Co. v. Boyle, 231 Ohio St., 131; Underhill v. Insurance Co., 6 Cush., 440; Clark v. Insurance Co., 6 Cush., 342; Heath v. Insurance Co., 1 Cush., 257; Blake v. Insurance Co., 12 Gray, 265; Norwich Trans. Co. v. Insurance Co., 34 Conn., 561; Graves v. Insurance Co., 12 Allen, 391; Insurance Co. v. Parisot, 35 Ohio St., 35-41; Cobb v. Insurance Co., 11 Kan., 93; 7 Am. and Eng. Ency. Law, 1056; Insurance Co. v. Pitts Exposition Society, 11 Atl. Rep., 572.

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of insurance (a copy of which is hereto annexed), insured plaintiff against loss or damage by fire to the amount of five thousand dollars on said property from January 23, 1889, at 12 o'clock noon, until January 23, 1890, at 12 o'clock noon.

On March 21, 1889, said property was damaged by fire to the amount of five thousand dollars and more. Plaintiff forthwith gave notice of said loss to said defendant, and said defendant soon thereafter sent one Clayton, their adjuster, to Washington C. H., Ohio, who prepared a particular account of said loss, which was signed and sworn to by Alfred Dun, a member of the firm of Dun & Co., for said plaintiff; said statement or proof of loss was retained by said adjuster, and plaintiff is unable to state particularly its contents. Said defendant afterward sent one Hall to represent them as adjuster in the settlement of said loss; and differences arising touching the loss or damages to said property, the matter was, at the request of defendant, submitted to impartial appraisers as provided in said policy of insurance, who proceeded to and did appraise each article of said property damaged by said fire, and said plaintiff, at the request of the defendant, exhibited to said Hall their books of account, and furnished him all the knowledge and information and means of information possessed by plaintiff touching said fire, the value of said goods, and everything connected therewith. After said Hall had finished said investigation, at his request Alfred Dun, acting for the plaintiff, met said Hall in the city of Columbus, Ohio, for the purpose of finally settling said loss. At said meeting said Hall read to said Dun the report of said loss and his investigations thereof prepared by him for said defendant and stated to said Dun that the formal proof of said loss had not been made by plaintiff as provided by said policy, but that said company waived it, and released the plaintiff from the performance thereof, and there offered plaintiff the sum of \$2,079 in settlement of said loss, which plaintiff refused to accept.

Plaintiff has duly performed all the conditions of said policy on its part, more than sixty days before the bringing of this action, except the condition of said policy requiring plaintiff to render a particular account of said loss, signed and sworn to by it; and as to said condition, says it can not state whether the proof of loss prepared by the adjuster of said company and signed and to by said Dun for plaintiff was a full compliance with the requirements of said policy in that regard, for the reason that said paper is now in possession of defendant. But plaintiff says that if the same was not a full performance of said condition, the performance thereof was waived by said defendant by the conduct of said defendant in relation to said loss above set out, and said defendant never at any time before the bringing of this action made any objection to the proofs rendered or demanded any further action or showing by plaintiff in relation to said loss, but on the contrary proceeded to consider plaintiff's

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claim on its merits, and offered to pay the sum of \$2,079 in settlement thereof as above set out, and refused to pay more on other grounds. No part of said loss has been paid and defendant has refused to pay the plaintiff more than the sum of two thousand and seventy-nine dollars on account of said loss.

Wherefore, the plaintiff asks judgment against the defendant in the sum of five thousand dollars, with interest from the 21st day of March, 1889.

AMENDMENT TO PETITION.

Now comes the plaintiff and amends its petition filed herein December 3, 1889, as follows: 1. By inserting therein after the word "thereafter," in the 16th line of page 2, thereof the following matter, "to-wit, about March 25, 1889."

Second. By inserting therein after the word "afterwards" in the 24th line of page 2 thereof, the following matter "about April 19, 1889."

Third. By inserting therein after the word "therewith" in the 6th line of page 3 thereof the following matter: "about April 30, 1889."

Fourth. By inserting therein after the word "it," in the 26th line of page 3, thereof, the following matter: "which condition reads as follows, viz.: 7.—Persons sustaining loss or damage by fire shall forthwith give notice of said loss to the company, and as soon after as possible render a particular account of such loss, signed and sworn to by them, stating what other insurance has been made on the same property, giving copies of the written portions of all policies thereon; also, the actual cash value of the property and their interest therein, exclusive of profits, for what purpose and by whom the building insured or containing the property insured, and the several parts thereof were used at the time of the loss, where and how the fire originated. The assured shall, if required, submit to an examination or examinations under oath by any person appointed by the company, and sign the same when reduced to writing; and shall also produce their books of accounts and other vouchers, and exhibit the same for examination at the office of the company and permit extracts and copies thereof to be made. The assured shall also produce certified copies of all bills and invoices, the originals of which have been lost, and shall exhibit all that remains of the property which was covered by this policy, damaged or not damaged, for examination to any person or persons named by the company."

ANSWER.

Defendant, for answer to the amended petition, as amended April 19, 1890, says:

First. For a first defense defendant denies that said plaintiff is a partnership formed for the purpose of doing business in the state of Ohio

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and engaged in business at Sabina, Ohio; denies that on January 23, 1889, said plaintiff was the owner of said personal property described in the plaintiff's petition; denies that said property was damaged by said fire to the amount of five thousand dollars, and denies that plaintiff sustained any damages by said fire. Defendant further denies that plaintiff forthwith, after said fire, gave notice thereof to the defendant; denies that one Clayton is, or was at the time of said fire, an adjuster of said company; denies he was sent as such by the defendant to Washington Court House; denies that said Clayton prepared a particular account of said loss, which was signed and sworn to by Alfred Dun, and denies that any such paper was received or retained by, or is in the possession of, the defendant. Said defendant denies that said Hall at Columbus at any time stated to Alfred Dun that said company waived formal proof of loss and released plaintiff from the presentation thereof, and denies further that it at any time waived such proof or released plaintiff from the presentation of the proofs required by the conditions and provisions of said policy of insurance issued to plaintiff, but on the contrary, defendant avers that said Hall, at the time said Alfred Dun saw him at Columbus, notified plaintiff that he had no right to, and defendant would not, waive any of the provisions of said policy of insurance, and would insist on all its rights thereunder.

Defendant further denies that it did not demand further action and showing by plaintiff in relation to said loss, and avers that on July 23, 1889, defendant notified plaintiff that it demanded of plaintiff full compliance on the part of the plaintiff with all the provisions of said policy.

Second. Defendant for a second defense to said action says that said policy of insurance held by the plaintiff contains a condition that in case of loss under said policy the amount thereof shall be estimated according to the actual cash value of the property at the time of the loss, and be paid sixty days after due notice and proofs of loss made by the assured and received at the office of the company in accordance with the terms and provisions of said policy. It contained also the following provisions:

7. Persons sustaining loss or damage by fire shall forthwith give notice of said loss to the company, and as soon after as possible render a particular account of such loss, signed and sworn to by them, stating what other insurance has been made on the same property, giving copies of the written portions of all policies thereon; also, the actual cash value of the property and their interest therein, exclusive of profits; for what purpose and by whom the building insured, or containing the property insured, and the several parts thereof, were used at the time of the loss; when and how the fire originated. The assured shall, if required, submit to an examination or examinations under oath by any person appointed by the company, and sign the same when reduced to writing, and shall also produce their books of accounts and other vouchers, and exhibit the

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same for examination at the office of the company, and permit extracts and copies thereof to be made. The assured shall also produce certified copies of all bills and invoices the originals of which have been lost, and shall exhibit all that remains of the property which was covered by this policy, damaged or not damaged, for examination to any person or persons named by the company.

Defendant says that plaintiff did not perform said conditions, did not give notice of said loss to defendant forthwith after said fire; that proofs of said loss were never made by the assured and forwarded and received at the office of the defendant, and said plaintiff wholly failed and neglected to render to defendant the particular account provided for by the aforesaid conditions of said policy."

AMENDMENT TO ANSWER.

Defendant now comes, and, by leave of the court for that purpose first obtained, withdraws from its answer the third and fourth defenses thereof, and by way of amendment to its said answer and for a third defense to the petition as amended April 19, 1890, says that the policy of insurance contained the condition that in the event of loss "the amount of loss or damage to be estimated according to the actual value of the property at the time of the loss, and to be paid sixty days after due notice and proofs of the same, made by the assured and received at this office in accordance with the terms and provisions of this policy, unless the property be replaced or the company have given notice of their intention to rebuild or repair the damaged premises."

Said policy contained also the following condition:

"In case differences shall arise touching any losses or damage upon building or personal property after proof thereof has been received in due form, the matter shall, at the written request of either party, be submitted to impartial appraisers, one to be selected by the assured and one by the company, who shall first elect an umpire or third appraiser, and shall then proceed to appraise on each article separately, and in case of said appraisers' disagreement as to the amount of loss or damage upon any one or more articles, they shall appeal to the aforesaid third appraiser, who, conjointly with them, shall appraise such articles only; and the decision of two of said appraisers under oath shall be binding as to amount of such loss or damage, but shall not decide the liability of the company under this policy. The company reserves the right to repair, rebuild, or to take the whole or any part of the articles at their appraised value."

Defendant says that on April 22, 1889, said plaintiff and defendant, pursuant to said condition of said policy aforesaid, selected two persons to appraise and estimate at the true cash value the damage by fire to such of said property covered by said policy as might be found in a damaged condition, and did submit said matters to said appraisers so chosen, who

were then and there duly sworn to act with strict impartiality in making said appraisement and estimate.

Defendant further says that said appraisers, having investigated said matters on April 23, reported accordingly that the damage to said property saved in a damaged condition and covered by said policy amounted to the sum of \$1,347.85 and no more. Defendant further says that thereupon the plaintiff and defendant, one Alfred Dun acting for plaintiff, and one J. B. Hall acting for defendant, said J. B. Hall being an adjuster of losses but not an agent of the defendant, attempted to ascertain the amount of loss or damage to the other property covered by said policy but not included in the appraisement aforesaid, but were unable to agree upon the amount of such damage, whereupon said effort to ascertain the amount of damage in the manner aforesaid ceased at that time.

Defendant further says that thereupon defendant notified plaintiff that it demanded an appraisement of said loss under said policy in the manner provided for in said condition aforesaid in this defense set out, but said Dun, acting in the premises, declined and refused to go into such appraisement, and in consequence of such refusal, said loss has never been submitted to appraisement and the amount thereof ascertained as provided by the terms aforesaid of said policy, and said defendant has been deprived of its right to take the whole or part of said articles at the appraised value. Defendant says that soon after said fire, said Dun sold and disposed of said property without the knowledge or consent of defendant, and contrary to the conditions of said policy, and defendant has ever been unable to get an appraisement of said damages, although it has ever been willing to go into the same. Wherefore defendant says said plaintiff is not entitled to maintain this action against defendant.

SECOND AMENDMENT TO ANSWER.

The defendant by way of amendment to its answer herein filed now comes and for a further and additional defense to the defenses already set up says, that one condition of said policy issued to said Dun & Company, is, that any false representation or concealment by the assured or his agent concerning ownership, condition, situation, use, or occupancy of the property insured, shall avoid this contract.

Defendant says that said Alfred Dun obtained said policy of insurance by falsely representing to the defendant, at the time he obtained said policy, that said insurance property was the property of, and owned by, a partnership composed of said Alfred Dun and Telfair Creighton, and that said property was the property of said partnership of Dun & Company.

Defendant says that said representation so made by said Alfred Dun was false and fraudulent, and that said property was not the property of 'd firm of Dun & Co., but was the property of said Alfred Dun alone,

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and in and under his separate and sole management and control, and that the said firm of Dun & Co., composed of said Alfred Dun and Tel-fair Creighton had long prior to said time of the issuing of said policy been dissolved, towit: in the spring of 1887.

Defendant says that, by reason of said false and fraudulent representation, said policy was and is void and of no force or effect.

Letter referred to in charge to jury:

GERMANIA FIRE INSURANCE COMPANY,
NEW YORK:

Chicago, July 23, 1889.

Messrs. Dun & Company, Sabina, Clinton County, Ohio.

Gentlemen: This company is in receipt of your notice of suit for a claim which you purport to have against this company under its Policy No. 98, issued at Washington Court House, Ohio. In reply to said notice of suit and in connection with your claim against this company of whatsoever nature under its Policy No. 98, we demand of you a compliance with the following conditions of said policy, which you have thus far failed to comply with:

First. Persons sustaining loss or damage by fire shall forthwith give notice of said loss to the company, and, as soon after as possible, render a particular account of such loss, signed and sworn to by them, stating what other insurance has been made on the same property; giving copies of the written portion of all policies thereon; also the actual cash value of the property and their interest therein, exclusive of profits; for what purpose and by whom the building insured, or containing the property insured and the several parts thereof, were used at the time of the loss; when and how the fire originated. The assured shall, if required, submit to an examination or examinations under oath, by any person appointed by the company, and sign the same, when reduced to writing, and shall also produce their books of accounts and other vouchers, and exhibit the same for examination at the office of the company, and permit extracts and copies thereof to be made; the assured shall also produce certified copies of all bills and invoices, the originals of which have been lost, and shall exhibit all that remains of the property, which was covered by this policy, damaged or not damaged, for examination, to any person or persons named by the company.

Second. And said Germania Fire Insurance Company hereby agrees to make good unto the said assured, their executors, administrators, and assigns, all such immediate loss or damage not exceeding in amount the sums insured, nor the interest of the assured in the property, except as herein provided, as shall happen by fire to the property above specified from the twenty-third day of January, 1889, at 12 o'clock noon,

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to the twenty-third day of January, 1890. The amount of loss or damage to be estimated according to the actual cash value of the property at the time of the loss, and to be paid sixty days after due notice and proofs of same, made by the assured and received at this office in accordance with the terms and provisions of this policy.

Third. In case differences shall arise touching any loss or damage upon building or personal property after proof thereof has been received in due form, the matter shall, at the written request of either party, be submitted to impartial appraisers, one to be selected by the assured, and one by the company, who shall first elect an umpire or third appraiser, and shall then proceed to appraise on each article separately, and in case of said appraisers' disagreement as to the amount of loss or damage upon any one or more articles, they shall appeal to the aforesaid third appraiser, who conjointly with them, shall appraise such articles only, and the decision of two of said appraisers under oath shall be binding as to amount of such loss or damage, but shall not decide the liability of the company under this policy.

We beg to assure you that when the above conditions are complied with, the company will proceed with due diligence to ascertain and determine the amount of its liability under the above numbered policy. So-liciting an early reply, we are,

Respectfully yours,

R. H. GARRIGUE,
Assistant Manager.

CHARGE TO JURY.

EVANS, J.

Gentlemen of the Jury: In order to recover in this action the plaintiff must prove, by a preponderance of the evidence, that said Dun & Company was a partnership doing business in Ohio as alleged; and that, at the time the policy of insurance was issued and at the time the property described therein was injured or destroyed by fire, such property was owned by said partnership; that said property was injured or destroyed by fire as claimed and the amount of such injury or loss; and that the plaintiff performed all the conditions of said policy on its part, or that the defendant waived such of the conditions as were not performed by it, sixty days before bringing this action; that such of said conditions as by the terms of the policy were required to be performed sixty days before suit brought, were performed, or the performance thereof was waived by the defendant, sixty days before the suit was brought.

The policy of insurance is the contract between the parties. The indorsement upon or attached, specifying how much of said \$5,000, the amount named, is upon specified classes of said property, is a part of the policy. Both parties are bound by, and have a right to insist upon the performance of, all the terms and conditions of the contract of insurance, the plaintiff as much as the defendant, and the defendant as

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much as the plaintiff, and either as much as an individual might do under like circumstances.

The plaintiff must have been, as alleged, a partnership doing business in Ohio, and the owner of the said property. If at the time the policy of insurance was issued, the firm or partnership of Dun & Company had been dissolved, and was not in existence, then the representation that the property was the property of Dun & Company, would avoid the policy, and the plaintiff cannot recover; if the property was, in fact, the property of Alfred Dun and not of Dun & Company; and this would be so whether such misrepresentation, as to the ownership of the goods were made intentionally or unintentionally by the said Dun. Whether or not the firm of Dun & Company was an existing partnership and the owner of the goods in question at the time the policy was issued, and at the time the goods were injured by fire, is a question of fact to be determined by you from the evidence; and the burden of proving it by a preponderance of the evidence, is upon the plaintiff.

A partnership, at will, may be dissolved by agreement of the partners. It may be done by an express agreement to that effect. But an express agreement is not essential. It may be done and inferred by acts and conduct of the partners, or one of them, showing an intention, put into effect, to terminate and put an end to the partnership. An intention without acts carrying such intention into effect, would not put an end to the partnership. The fact, if a fact, that Creighton went to Los Angeles to live at a time mentioned, and paid or gave no further personal attention to the business of Dun & Company, but left it wholly to Dun, would not in itself work a dissolution of the firm. But from this circumstance, and all other facts bearing thereon, disclosed by the evidence, you will determine as a matter of fact, whether or not the partnership had been dissolved before the policy was issued, or before the fire. If it had been dissolved the plaintiff cannot recover. If it had not been dissolved before the policy was issued, or before the fire, if it was an existing partnership, as alleged by the plaintiff, and the owner of the goods, it can recover, if it has in other respects made out its case under the instructions. If Dun & Company was a partnership for the purpose only of carrying on a banking business, the fact, if a fact, that Dun purchased the goods for the firm of Dun & Company, in consideration for and in satisfaction of a judgment in favor of Dun & Company against the then owner thereof, without consulting Creighton or getting his consent thereto, did it in good faith, thinking it for the best interest of Dun & Company to do so; and the further fact, if a fact, that he, thinking it for the best interest of Dun & Company to do so, kept the store, of which the goods in question constituted the stock, open as a going concern and sold goods therefrom for a time, will constitute no defense for the defendant in this action.

The policy of insurance contains, as one of its terms and conditions, this: "that in case of loss the amount thereof shall be estimated according to the actual cash value of the property at the time of the loss, and be paid sixty days after due notice and proof of loss made by the assured and received at the office of the company in accordance with the terms of the policy." It also contains a condition that in case of loss the insured shall forthwith give notice to the company of such loss, and shall render a particular account of said loss, signed and sworn to by the insured, which shall contain the matters particularly specified in condition seven of the policy. These conditions are binding upon the plaintiff, and it cannot recover unless it has shown that it performed them, or has shown waiver of such performance on their part by the defendant. This notice and proof of loss must be furnished, or waived, too, for sixty days before the insured is entitled to payment or has a right to bring a suit for the same. If the insured brings suit within the sixty days, he must fail, except in the event of the company denying all liability on the policy. In the latter event an action may be commenced without waiting the time limited, sixty days. Bliss, Life Ins., sec. 355-8; Woods, Ins., page 728.

Waiver of proof of loss does not make the claim due at once; the company would still be entitled to the sixty days after the waiver to investigate, and for such other purposes as it might want the time for, except as stated, unless it notifies the insured that it will not pay in any event. In the latter event, the condition that no action be brought within sixty days after proofs of loss is deemed waived. So also, a denial of all liability, made after inquiring into the loss, on the ground that the loss is not within the policy, or that the policy is void, is a waiver of the clause requiring proofs of loss.

A notice of the loss given immediately after the fire, or as soon thereafter as it can be done with reasonable diligence, to the agent of the company at the place where the fire occurred, or with such diligence causing notice of the loss to be brought to the knowledge of the company, is a sufficient compliance with the condition requiring notice of the loss to be given to the company.

"The requirement of preliminary proofs of loss is a formal condition, inserted in the policy solely for the benefit of the insurer. That such proofs may be waived, in whole or in part, is well settled as a legal proposition. The waiver may be by the direct action of the insurer, or by his general agent, by virtue of his authority. The waiver may be express, or it may be inferred from the denial of obligation by the insurer, exclusively for other reasons." Insurance Co. v. Parisot, 35 Ohio St., 40.

A waiver may be inferred from the acts and declarations of the company, or of its authorized agents acting within the scope of their employment. The adjuster, employed by the defendant to act for it in

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the matter, was the agent of the company, and all he did in the matter within the scope and line of his employment and duties as such adjuster, were the acts of the company and binding upon it.

Mere silence on the part of the company will not amount to a waiver of proof of loss ; nor would the sending of agents to make inquiry or investigation into the matter of the loss ; nor would even an attempt to compromise the matter, either or all of them, in themselves amount to a waiver of proofs of loss, provided nothing was done while so engaged that would cause a man of ordinary judgment and discretion to believe that formal proofs of loss were waived. But if such agent or agents while so engaged, act in the matter so as to cause the insured to believe that proofs of loss are waived, and their acts are such as would have caused a man of ordinary discretion and judgment to so believe, and the insured, by reason thereof, refrain from making such proof, such acts will amount to a waiver of such proof. If the company, by its adjuster or agent, proceeds to investigate the matter of the loss on its merits, and by what it does, causes the insured to believe, and a man of ordinary judgment under the circumstances would have so believed, that it is only the amount of the loss that is in dispute, and nothing else, between the parties, that will amount to a waiver of proofs of loss. So, as said, an absolute refusal to pay on the merits of the claim, or a denial of liability to pay in any event, will amount to a waiver. The company must not by its acts, or by the acts of its agents acting within the line of their duties and authority as such agents, do anything that will throw the insured off of his guard, and cause him to believe that proofs of loss are not wanted by the company. If such acts are such as would cause a man of ordinary judgment and discretion to so believe, in like circumstances, and the insured so believed and acted on such belief, the company will be held to have waived such proofs.

And if the company waived such proofs, it cannot afterwards recall, or reclaim, such waiver, and demand or insist upon such proofs. If once waived, the company cannot afterwards insist upon the performance of the condition requiring such proof.

From the fact, if a fact, that the company sent an agent to the place of the loss to make investigation in regard to the same, and from what the evidence may show, if anything, he did about making such investigation ; from the fact, if a fact, that the company sent an adjuster to adjust such loss and from all such adjuster did in regard to the matter ; from the fact, that the plaintiff and defendants, on April 22, 1889, pursuant to the condition in the policy, set out in printed matter in the third defense as amended, selected two persons to appraise and estimate at the true cash value the damage by fire to such of said property covered by the policy as might be found in a damaged condition, as alleged in said defense ; the fact of such appraisement being made and reported by such appraisers ;

the fact, if a fact, that Dun and such adjuster agreed upon the loss upon other of the property covered by the policy; from what the evidence shows was done and passed between said adjuster and Dun while about the matter of attempting to adjust such loss, altogether, from all these and from all circumstances disclosed by the evidence, you will determine whether or not the company waived proof of loss, the burden of proving such waiver, by a preponderance of the evidence, being upon the plaintiff. If so waived sixty days before suit brought, the plaintiff is entitled to verdict if it has otherwise made out its case. If such waiver was made within sixty days before the suit was brought, the plaintiff cannot recover, unless the plaintiff prove there was an absolute refusal by the company to pay in any event.

The policy contains a condition, providing that in case difference shall arise touching any loss, after proof thereof has been received in due form, the matter shall, at the written request of either party, be submitted to impartial appraisers, one to be selected, etc.

This is a condition that may be waived by the parties, in whole or in part. The defendant alleges that, in pursuance of said condition of the policy, the parties did select two appraisers to appraise the damage by fire to certain of the property covered by said policy, and that the appraisers made and returned such an appraisement. It further alleges, that afterwards, Dun, acting for the plaintiff, and one J. B. Hall, an adjuster, acting for defendant, not being able to agree upon the amount of damages to the other property, thereupon the defendant demanded an appraisement of said loss under said policy in the manner provided for in said condition; but that Dun, for the plaintiff, refused to enter into the same, and that it has not been able to get such an appraisement.

Neither party is entitled to demand and have more than one appraisement under said condition; if once demanded and appraisement had, neither can under this clause demand and have a second appraisement of the same. If only an appraisement of a part of the loss is called for under this clause, and both parties understood at this time that the appraisement demanded and made was only an exercise in part of the right given in this said condition, to say the least, neither party can again demand a reappraisement of the part so appraised.

It is a privilege, too, that should be exercised within a reasonable time after the right to demand it arises. Neither party can be required to wait indefinitely the pleasure of the other in the matter of demanding such an appraisement. The insured could not be required to wait unnecessarily and hold the property in the condition it was left by the fire; serious expense and loss might result thereby to him.

If the only written demand, after the partial appraisement had, mentioned, was the letter offered in evidence, dated July 23, 1889, the defendant was not entitled to such an appraisement.

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There being no evidence to prove any other written request, you are instructed to find against the defendant on the third defense, and in favor of the plaintiff upon the issue as to it.

The following special instruction, agreed upon by counsel, is requested, to-wit:

"As to the property covered by the policy of insurance that was saved in a damaged condition and submitted to appraisers by the parties, the amount of damage assessed by the appraisers and returned by them as their award was \$1,347.85."

If you find it necessary to inquire into the amount of damages sustained by the fire, then I charge you that as to that part of the property which was submitted to the appraisers, the damages fixed by the appraisers and returned in their award is conclusive, as to the amount.

Also special instruction No. 2 asked by defendant is given as requested and excepted to by plaintiff:

"That the papers show that this action was begun by the filing of the petition on June 22, 1889, the waiver, if any, must have been made at least sixty days before that time, to enable the plaintiff to recover, unless an absolute refusal to pay in any event had been made by the defendant."

Also special instruction asked by plaintiff:

"In determining whether the sixty days had elapsed before the action was commenced, you are not necessarily to be governed by the date when negotiations ceased between the parties in reference to the loss, but will determine from all the facts and circumstances in evidence the time when, if ever, the company waived said proofs of loss."

If under the instructions you find for the defendant, you will return a verdict finding, upon the issues, in favor of the defendant. If you find for the plaintiff, you will return a verdict finding, upon the issues, in favor of the plaintiff, and award it damages in the amount you find from the evidence was the loss upon the property described in the policy caused by such fire, and the amount of loss or damages to be estimated according to the actual cash value of the property at the time of the loss with interest from the time it should have been paid; but you will understand that you must keep in mind and be governed in fixing the amount by the special instruction above given.

In no event can the amount of damage awarded exceed \$3,500 on that part of the property designated as stock; exceed \$400 on soda fountain and fixtures inventoried; or exceed \$1,100 on the furniture and fixtures mentioned.

And the defendant then on the trial excepted to said charge, as a whole, and to all the several parts of the said charges marked on the margin thereof excepted to. And the defendant excepted to the special charge and instructions asked for by the plaintiffs.

The defendant asked the court to charge the jury, as follows:

"In order to effect a dissolution of a partnership it is not necessary that there be a formal dissolution of the firm, agreed upon between the partners. It is sufficient if they have separated with the intention of giving up and discontinuing their relations to each other as partners. You will, therefore, in this case consider all the testimony that has been offered in relation to this partnership in connection with the conduct of the members of the partnership toward each other, to determine whether the firm of Dun & Company at the time of bringing this action was a firm doing business in the state of Ohio."

But the court refused to give said instructions, to which refusal to so instruct the jury the defendant then excepted.

The defendant further asked the court to charge and instruct the jury as follows:

"If the firm of Dun & Company was not dissolved at the time Dun purchased the stock of drugs, etc., at sheriff's sale, and was a firm organized only to do a banking business in Sabina, Ohio, and Creighton had gone away, leaving his partner to conduct and carry on that business in his absence, then Dun would have had no right to have purchased this stock of goods in the name of Dun & Company, and gone into this new business in that name without the knowledge and consent of Creighton; and if he did so, and Creighton did not consent to it at the time or subsequently, then the purchase did not bind the firm of Dun & Company, and Dun & Company did not by such purchase become the owner of said stock, and it was a misrepresentation for Dun & Company to take out the policy of insurance in the name of Dun & Company, and under that provision of the policy requiring the assured to make known the ownership, the policy would be void and the company not liable."

The court refused to give to the jury said charge and instruction, to which refusal the defendant then excepted.

The defendant further asked the court to charge and instruct the jury as follows:

"That the submission of the question of damages as to the property saved in a damaged condition by Hall and Dun, was not a waiver of the right of the defendant subsequently to demand proofs of loss."

But the court refused to give the said charge and instruction to the jury, to which refusal the defendant then excepted.

Sibley v. Ross.

LANDLORD AND TENANT.**[Superior Court of Cincinnati, Special Term, 1890.]*****JAS. W. SIBLEY ET AL. V. SIMON ROSS ET AL.****1. VIOLATION OF LEASE—RENT—DAMAGES.**

Where the lessors of a building under contract to repair its walls negligently or perversely refuse to perform the obligations of the contract, they not only can recover no rent but would be liable to the lessees for damages sustained by breach of the contract.

2. RENT OF INSECURE BUILDING—LESSEE LIABLE, WHEN.

Under a lease, of a building to be used for operating heavy machinery, wherein it is provided that lessors shall keep the walls (which, when the lease was made and to the knowledge of both parties, were bolted together), in repair and it appears that, upon being notified and finding that the walls were insecure, lessees were ready and willing to repair them, even to the extent of rebuilding, but were prevented from carrying out plans, prepared by an architect, for doing so, by lessees, in the first instance, claiming that the plans were insufficient, and then prevented from making repairs by the city, such lessees are liable for the stipulated rent during the time they retained possession of the building, notwithstanding the fact that it was insecure and untenantable.

This action was brought by James W. Sibley and wife against Simon Ross, Jr., and others for three months' rent at the rate of \$250 per month, of premises located upon Sycamore street, in the city of Cincinnati, occupied under a written lease between the parties, by which Ross and partners agreed to pay such rental to Sibley and wife during their tenancy. The answer of the defendants admits the execution of the lease, the agreement to pay rent, and sets up a covenant contained in the lease, that Sibley and wife should keep all roofs of the premises in repair, and also, if the walls of the building should be insecure, to place them in good repair.

The answer also avers that the plaintiffs knew at the time of the execution of the lease, the character and kind of business that the defendants proposed to carry on upon said premises, and that the covenant to keep in repair all walls of the buildings was inserted in the lease with full knowledge upon the part of Sibley and wife, of the purpose for which the buildings were to be used by the lessees. The answer also charges that Sibley and wife have not kept this agreement, and that having failed to do so, the lessees are not liable for any of the rent.

*The judgment in this case was affirmed by general term, January term, and by the Supreme Court, 52 Ohio St., 668, unreported.

*In the Supreme Court, Chas. W. Baker, for plaintiff in error, cited: Huston v. Railroad Co., 21 Ohio St., 235; Wolf v. Arnott, 109 Pa. St., 473; Kincaid v. Britton, 5 Snead, Tenn., 120; Williams v. Healey, 3 Denio, 363; Burrows v. Clarey, 53 Ill., 30; Williams v. Healey, 3 Denio, 363; Sec. 4113, Rev. Stat.

*Ramsey, Maxwell and Ramsey, and Lawrence Maxwell, Jr., for defendant in error, cited: Hart v. Windsor, 12 M. & W., 68; Dutton v. Gerrish, 9 Cush., 89; Sutton v. Temple, 12 M. & W., 52; Krueger v. Fanaudt, 29 Minn., 385; Suydam v. Jackson, 54 N. Y., 450; Hilliard v. Gas Coal Co., 41 Ohio St., 662, 669; Johnson v. Oppenheim, 55 N. Y., 280.

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comply with his contract, was not ready to do it and willing to do it and able to do it, then not only can he recover no rent, but the defendant is entitled to recover damages on his answer and cross-petition, for whatever damages he sustained.

Mr. Baker: "There is one point. I would like your honor to charge that if by reason of anything, without the fault of either of these parties, these premises become untenantable, or a portion of them become untenantable, the defendant is not liable."

The Court: "This is not a case of lightning striking them and knocking them all to pieces, or an earthquake dashing them down, or a fire burning them down; it is a case of ordinary decay, long continued, which must have been observed by the parties, and I think I have charged the jury sufficiently so that every one of them understands what I mean, and if I did not, they will retire to the jury room and find out."

Gentlemen, you will retire to the jury room now and consider your verdict.

Mr. Baker: "Allow me to reserve an exception to the last part and to your honor's refusal to give what I asked."

The Court: "Let me hear that again?"

Mr. Baker: "I asked your honor to charge that if without fault of either of these parties the building became untenantable, my client is not to be chargeable with the expense of the damage."

Which charge the court refused to give. To which refusal the defendant, by his counsel, then and there excepted.

Mr. Ramsey: "Your honor might tell the jury there is no dispute about the amount, \$250 a month."

The Court: "Oh, no. Gentlemen, there are three forms of verdict prepared for you."

We the jury on the issue joined find for plaintiffs and assess their damages at _____ dollars.

We the jury on the issue joind find for the defendants.

We the jury on the issue joined find for the defendants.
their damages at _____ dollars.

Mr. Baker: "With your honor's permission I will take a general exception to the charge."

"I except to the part of the charge where your honor instructs the jury that if Sibley was ready and willing to do anything he could, and if he was ready and willing to repair the wall, or if he did not repair the wall he was perfectly willing to tear it down and build it up again; that even if the building had become untenantable, yet, nevertheless, his willingness is sufficient to charge Ross, Moyer & Co. with the rent; as long as he was ready and willing to do it he can sit down and not do it."

"And to that part of the charge that Ross, Moyer & Co., are to pay the rent if there was such willingness upon the part of Sibley."

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"Also, to the statement that if Sibley was prevented by the city or from any cause over which he had no control, that that would excuse him, and Ross, Moyer & Co. would have to pay the rent."

Whereupon the jury retired, and after deliberation returned a verdict for the plaintiff.

Thereupon the defendants, by their counsel, made a motion to set aside said verdict and for a new trial, which also appears of record in the cause, which motion, upon deliberation, was overruled by the court, to which defendants, by their counsel, excepted.

LANDLORD AND TENANT.

[Cuyahoga County Common Pleas, January Term, 1890.]

*ALBERT J. CHRIST V. WRE, JOSEPH & CO.

1. COVENANT TO SURRENDER IN GOOD REPAIR—SECTION 4113, REV. STAT.

A covenant in a lease to deliver up premises in as good condition and repair as the same shall be put in by the lessor at the commencement of the term, the natural wear and decay excepted, is a covenant to make such repairs only as would ordinarily arise under their occupation, and does not include extraordinary conditions resulting from injury to or destruction of the premises by fire or the elements, and does not prevent the operation or application of Sec. 4113, Rev. Stat.

2. SECTION 4113, REV. STAT.—EXTENT OF INJURY.

To justify a lessee abandoning premises or insisting upon termination of a lease under Sec. 4113, Rev. Stat., the injury must go to the extent of rendering the premises unfit for occupancy; that is, the injury must go so far toward total destruction as to be no longer suitable to be used for commercial purposes, or such as it was fairly and reasonably designed to accommodate in its original construction.

3. RULE APPLIED—INJURY TO PART OF PREMISES ONLY.

If the results of a fire were such as to render a whole building or property leased untenable and unfit for occupancy, it would make no difference where the fire occurred to take advantage of Sec. 4113, Rev. Stat., but if the fire was of such extent as to render only a small part of the premises unfit for occupancy and untenable, and the remainder of the premises

*The judgment in this case was affirmed by the circuit court, October term, 1890; and by the Supreme Court, 52 Ohio St., 677, unreported.

White, Johnson and McCaslin, for defendant in error, cited: Linn v. Ross, 10 Ohio, 412; Cornish v. Winton, 5 Ohio, 477; Suydam v. Jackson, 54 N. Y., 450; Hilliard v. Coal Company, 41 Ohio St., 662; Rolle Abr., 236, Appor., Par., 1-2; Linn v. Ross, 10 Ohio, 412; Womack v. McQuarry, 28 Ind., 103-105; Whittaker v. Hawley, 25 Kan., 674, 689-691; Coleman & Co. v. Insurance Co., 49 Ohio St., 810; Graves v. Berian, 26 N. Y., 498; 2 Wood Land. & Ten., 1089, 1098, note 3; 1 Tayl. Land. & Ten., Sec. 386, note 3, 387; Avery v. House, 1 Circ. Dec., 468; Suydam v. Jackson, 54 N. Y., 450, 454-455; Sutphen v. Seebass, 12 Daly, 139, 141; Hilliard v. Coal Co., 41 Ohio St., 662, 669; Turner v. Mantonya, 27 Ill. App., 500, 502; Smith v. McLean, 123 Ill., 210, 219; Wall v. Hinds, Gray, 256; S. C., 64 Am. Dec., 64; Vanderpoel v. Smith, 2 Daly, 135; Spalding v. Munford, 37 Mo. App., 281, 283; Lewis v. Hughes, 12 Col., 208, 214-215; Cook v. Anderson, 85 Alabama, 99; Wall v. Hind, 4 Gray, 256; Vanderpoel v. Smith, 2 Daly, 135; Spaulding v. Munford, 37 Mo. App., 281, 282-283; Lewis v. Hughes, 12 Col., 208, 214-215; Cook v. Anderson, 85 Ala., 99; Lockrow v. Horgan, 58 N. Y., 635; Abby v. Phillips, 35 Miss., 618; s. c., 72 Am. Dec., 143, 147, 148, note; Davis v. Alden, 2 Gray, 309; s. c., 95 Am. Dec., 122; Wood Land. & Ten., 599, Sec. 373; Ely v. Ely, 80 Ill., 532; Loft v. Dennis, 1 El. & El., 454.

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were not affected so as to render it impracticable to prosecute the business in the remaining premises, without serious or substantial interruption, it would not terminate the lease as a whole but would leave the lessees liable to pay a proportionate part of the rent for the premises left in a rentable condition.

4. OFFER TO REPAIR DOES NOT DEEMAT STATUTE.

If the premises in question were so injured by fire, without the fault or negligence of the lessees, as to render them untenantable and unfit for occupancy, the lessees would have the right to terminate the lease notwithstanding the lessor offered to restore and repair them.

5. TEMPORARY INCONVENIENCE.

Mere temporary inconvenience, a wetting of the walls, and floors, merely putting out a fire in the furnace by flooding the cellar, if it could be removed and effects overcome in a short time, or mere cessation or interruption to business for a day or two would not alone constitute such destruction or such injury as would justify a lessee in terminating a lease under Sec. 4113, Rev. Stat.

6. QUESTION FOR JURY—BURDEN OF PROOF.

Whether premises occupied under a lease containing a covenant to make the ordinary repairs resulting from occupation were without fault or negligence of the lessees destroyed or so injured by fire or the elements as to be unfit for occupancy, so as to relieve them from payment of rent, under Sec. 4113, Rev. Stat., providing that lessees shall not be liable to pay rent under such circumstances, is a question to be determined by the jury and the burden is on the lessees to prove by a preponderance of proof the extent of injury or destruction.

7. OBJECT OF VIEWING PREMISES.

The object of a view by the jury of the premises in dispute is for the purpose of affording them a better understanding, appreciation and application of the testimony submitted at the trial, and not for the purpose of gathering facts therefrom upon which to make up their judgment.

8. CHARACTER AND CREDIBILITY OF TESTIMONY.

Notwithstanding the defendants had the right to sub-let premises occupied by them under a lease, they would not, by sub-leasing, release themselves from the payment of rent under their own lease, and inquiry as to whether they were undertaking or seeking to lease other premises, get out of and relet the premises occupied by them and into others, before the former were injured by fire, was permissible only to test the credibility and character of the witnesses interrogated.

Albert J. Gilchrist brought an action against Weil, Joseph & Company, to recover rent for certain premises in Cleveland. The principal defense was that the defendants were discharged from the obligation to pay rent under their lease, by the injury to the demised premises, under sec. 4113, Rev. Stat. The facts bearing materially upon the questions are as follows: Mr. Gilchrist owned two store buildings, situated side by side, each containing four stories and a basement, separated from each other by a brick wall; one, known as 63 and 65 St. Clair street, was what is called in the evidence "a double store," that is, it was a store twice as wide as the ordinary stores, each floor, however, containing but one store room. At the time when the lease was made, the two stores, the double and the single, were entirely distinct from each other; each had its own system of heating, lighting, water and sewerage; each had its own internal sys-

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tem of communication from one floor to another by means of stairs and elevators. There were no apertures connecting the two buildings except perhaps one in the basement, permanently closed by an iron door. The double store was vacant. The two upper stories of the single store were occupied. Under these circumstances, a written lease was made by Gilchrist to Weil, Joseph & Company, leasing:

"The messuage or tenement known as numbers 63 and 65 St. Clair street in said Cleveland, and the third and fourth floors of No. 67 St. Clair street immediately adjoining said No. 65 St. Clair street, together with the right of way in common with others over the alleys connecting with said premises, and the yard in the rear of the same, for the term of five years from March first, 1885, at an annual rental of twenty-five hundred dollars."

It then provided for making some four thousand dollars worth of improvements by the lessees, among which improvements were to be "new oak floors first and second stories above basement, patch remainder of all other floors in said building; ceil overhead, and case beams in second story of No. 63 and 65 and in third story of No. 63 and 65, common ceiling in fourth story of No. 63, 65 and 67, and case the posts on the third floor * * * iron skylight 5-14, plaster side walls of second story in No. 63 and 65 and the third story in No. 63 and 65 * * * hydraulic elevator and attachments, low pressure boiler and steam fixtures for heating said premises."

This sum was to be repaid to the lessees by the lessor. It further provided that if the "second party remove the safety vault, they shall remove and rebuild it, including the entire foundation from the basement bottom up, in as good condition as they now are."

It further provided that "if the first party be unable to get the third and fourth stories in No. 67 vacated by March 1, 1885, then the rent herein stipulated to be paid by the second party shall be reduced twenty-five (\$25) dollars per month so long as they may be kept out of possession of said third and fourth stories, which time shall not exceed one year from March 6, 1885."

The lessee further covenanted "that the second party will deliver up and surrender to the first party or its heirs, executors, administrators or assigns the possession of the premises hereby leased, at the expiration of the term aforesaid, in as good condition and repair as the same shall be put by the second party at the commencement of said term, the natural wear and decay excepted."

Some of the things which were put in new, are the principal things claimed to have been injured by the fire. After the lease was made, in pursuance of the rights conferred by the lease, two archways on each of the third and fourth stories were made by the lessees through the brick wall separating the double store from the single store. The heating,

lighting and water systems were changed in the third and fourth stories of the single store, so as to connect with the system in the double store, and to be disconnected with the lower floors of the single store. The interior communications between the lower floors and the third and fourth floors of the single store were also severed. Lessees went into possession of all the demised premises, and made all the changes provided for in the lease, and were reimbursed therefor by the lessor. For some six months before the fire the lessees had been dissatisfied with the premises, and had been trying to sub-let them, having had signs up, and had been negotiating for other premises.

Under these circumstances, on the night of December 30, a fire occurred in the demised premises. The lessees taking advantage of the supposed opportunity to avoid the obligation of the lease, telegraphed Gilchrist on December 30, informing him of the fire, and surrendering the premises. Gilchrist on the same day telegraphed declining to accept the surrender, and directed a carpenter to repair the damage. Either that afternoon or the afternoon of December 31, the carpenter did close the aperture in the roof so that the demised premises were not exposed to the elements, except through the broken or burned windows. The repairs were all completed by the night of January 14.

At the close of the testimony and before the argument of the respective counsel the defendants requested the court to give the following charge, which the court gave, to-wit:

First. "If you shall find from the evidence that the fire spoken of occurred without fault or neglect on the part of the defendants, and that its effect was to occasion a substantial injury to the structure of the part of the building covered by this lease and as a result thereof the said rooms became unfit for occupancy, and the defendants within a reasonable time after the fire surrendered the possession of the premises to the plaintiff, then the plaintiff cannot recover."

And at the same time the defendants asked the court to give the following charges to the jury, which the court refused to give. To which refusals the defendants then and there excepted. To-wit:

Second. "If you find that the fire occurred in the manner and with the result which I have stated in order to find that the rooms became unfit for occupancy within the meaning of this statute, it is not necessary that all the rooms or any particular number of them shall be unfit for occupancy, and if in fact any material part of the premises were so injured that the premises as a whole became unfit for the general use to which as a whole, they would have otherwise have been adapted, then they, in fact, became so injured within the meaning of the statute as to be unfit for occupancy."

Third. "If you shall find the occurrence of the fire in the manner and with the result which I have just stated, and the rooms rented or any

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material part thereof became so injured that they could not as a whole be occupied for the general purposes for which rooms of that kind are adapted, with substantially the same comfort of occupancy and substantially the same facilities of using all the rooms without making repairs—the making of which would have involved substantial loss of time and substantial expenditure of money then such premises would be within the meaning of this statute unfit for occupancy."

Fourth. "A building is so injured by the elements as to be unfit for occupancy when it is rendered unfit to be occupied for the purposes for which buildings of the class to which the building in controversy belonged are ordinarily occupied."

Fifth. "In determining the question as to whether the condition of unfitness for occupancy of which I have spoken has been occasioned, the fact that the tenant might by making repairs have adapted the property to his uses and have made it suitable for occupancy will make no difference unless the damage was slight and the repairs could have been made immediately and with little expense."

Sixth. "If you find that the condition of the rooms in controversy immediately after the fire was such as to render them as a whole unfit for occupancy, the fact that by some small expenditure of time and money they could have been put in such condition as to have prevented a part or all of the inconvenience resulting will make no difference, if such repairs would have been when made of a mere temporary character and such as would for such future use have required replacing by repairs of a substantial and more expensive character."

Eighth. "The third and fourth floors of No. 67 St. Clair street having been leased to defendants by plaintiff under and by virtue of the same lease which conveyed No. 63 and 65 St. Clair street, the jury must regard the said third and fourth floors of No. 67 and the premises known as No. 63 and 65, as forming one entire building within the meaning of the statute, and the defendants would not be obliged to pay rent for No. 63 and 65 if the damage to No. 67 rendered said building, as an entirety, unfit for occupancy."

Charge to the Jury.

STONE, J.

Gentlemen of the Jury: This action is brought by Albert J. Gilchrist against the partnership and firm of Weil, Joseph & Co. to recover certain installments of rent claimed to be due him for certain premises on St. Clair street, in this city.

It is alleged, in substance, that on January 29, 1885, Albert Gilchrist executed a lease to these defendants of premises known as Nos. 63 and 65 and the two upper floors of No. 67 St. Clair street, in this city, for the term of five years from and after March 1, 1885, and that these defend-

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ants, Weil, Joseph & Co., agreed to pay for such premises the sum of \$2,500 a year as rent, \$300 being for rent for said two upper floors in the building known as No. 67. The rent was payable in four equal installments of \$625 each at the expiration of each and every three months. the month of March being first by itself, and then after that, commencing April 1, 1885, was payable in four equal installments of \$625 each quarter.

It is alleged that the defendants, by said written lease, covenanted to deliver up said premises at the expiration of said term in as good condition and repair as the same shall be put in by the second party at the commencement of said term, the natural wear and decay excepted.

It is alleged that upon the making of this lease, or after it was made, this firm entered into the possession of the premises, and so continued in possession until the happening of this fire.

It is alleged, too, that on July 27, 1887, Albert Gilchrist assigned said lease to this plaintiff, Albert J. Gilchrist.

It is further alleged that about January 1, 1888, Weil, Joseph & Co. vacated the premises and gave to the plaintiff the keys thereof, but that the plaintiff refused to accept the surrender of the premises, or to release the defendants from their covenants or obligations under the lease, but that he then notified the defendants that he would take the keys, rent the premises only for and on their account, and would hold them, as such partners, responsible for any damage done said property, or hold them responsible for any deficiency in the rent and for breach of any of the other covenants of the defendants, as lessees. He says that afterwards on March 1, 1888, he rented the premises to Stinchcomb, Hendry & Co., for an annual rental of \$2,000, which was the highest rent he could then obtain for the premises, and payable at the same time and in the same manner as said defendants had paid. He says that since that time these defendants have not performed the covenants or the conditions of the lease originally made with them; but that on the first of April, 1888, they did not pay the rent then due which he says under the lease was \$625, and that their tenants, Stinchcomb, Hendry & Co., who had entered into possession under this second lease paid only \$166.66, and on July 6, of that year, 1888, these defendants, as partners, disregarded their said covenant to pay rent due as claimed for that quarter—failed and refused to pay said rent—but that they paid through their said tenants, or those to whom the premises were subsequently let, Stinchcomb, Hendry & Co., only \$500, wherefore he says there is due to him, this plaintiff, from these defendants, as rent for said premises, the sum of \$583.34, with interest on \$458.34 from April 1, 1888, and interest on \$125 from July 1, 1888, and it is for that amount that a verdict is sought at the hands of this jury.

I do not know whether the jury clearly comprehend just how the computation has been made upon which this statement is made; but, as I understand it, the action is to recover the rent for two quarters, one

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quarter due on April 1, and another on July 1, 1888, and giving credit for different sums this plaintiff realized from Stinchcomb, Hendry & Co., to whom he says he let the premises with the view of getting as much as he could out of them, and applying the money so received upon the lease which he still claimed was in operation as between himself and these defendants. As I recollect it, it is claimed that this second firm, Stinchcomb, Hendry & Co., went into possession about March 1; so that upon April 1, the plaintiff received from them whatever was due him for one month, perhaps \$166.66; and he gives credit on the first quarter's installments, which was \$625; that is to say, his claim is that there was due him on April 1, from Weil, Joseph & Co., \$625, but having gotten out of that quarter \$166.66 from Stinchcomb, Hendry & Co., giving them credit for that amount, left a balance due to him of \$458.34.

Then when he comes to the next quarter his suit is to recover whatever is still due him after giving credit for the full quarter's payment as made by Stinchcomb, Hendry & Co., which was on the basis of \$500 a quarter. After giving them credit for \$500 upon the amount he then claimed to be due, the \$625, left a balance of \$125; so that you see the action is to recover what is left as due to him upon these two quarters; on the first quarter \$458.34 and on the second quarter \$125, claiming interest on each quarter from the time it became due. That is the plaintiff's cause of action.

To this petition the defendants have answered admitting, first, that they are partners as is alleged in the petition. They admit that on January 29, 1885, one Albert Gilchrist, by written lease, duly demised to them under said firm name, the premises known as Nos. 63, 65 and the two upper floors of No. 67 St. Clair street, in this city, for the term of five years from and after March 1, 1885; and it is admitted that they, by the terms of the lease, agreed to pay the sum of \$2,500 a year rent for the premises, and to pay it as stated in the petition; that is, for the month of March, 1885, they were to pay the amount due for one month, and that thereafter it was payable in quarterly installments of \$625, and payable at the expiration of each and every three months during the continuance of the lease.

They admit that they entered into the possession of these premises under this lease, and that they paid rent for the same at the times and in the sums called for in the lease until January 1, 1888.

They admit that about January 1, 1888, they vacated the premises, and gave the keys thereof to the plaintiff, but they deny all the other allegations contained in this petition; that is, they deny all the allegations in the petition that are not expressly admitted. There is, perhaps, therefore, I take it, a denial of the assignment.

Mr. Henderson: "There is no dispute of the fact though."

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The Court: "There is no dispute now of the fact that it was assigned by the original lessor, Albert Gilchrist, to the present plaintiff, Albert J. Gilchrist."

By way of a further and second defense they say that on December 29, 1887, they were in possession of the building and premises in this petition described, and under the lease, as therein set forth; that on or about that date, namely, December 29, said premises and building were, without any fault or negligence on the part of said defendant, destroyed and so injured by the elements and other causes as to be unfit for occupancy, and said defendants thereupon surrendered possession thereof to the lessor. And for that reason they say they are not liable for any further payments of rent, and that by reason of the fire and the result of it, or by reason of the destruction or injury to the premises by the elements, they were released from all further obligation to pay rent, and that at that time they vacated the premises.

The plaintiff, Albert J. Gilchrist, replying to this answer denies what is set up by way of a second defense; that is, denies this defense wherein it is alleged that by reason of the destruction or injury to the building the premises became unfit for occupancy. He denies that any such condition of things as that occurred, or that whatever did occur there was of such character as that it worked out a cancellation of the lease, or the right to surrender these premises and the termination of the lease as to the defendants. Now, that makes up the issue to be determined in the case; and so far as the jury is concerned the principal question for your consideration arises upon this second defense, namely, whether the fire that occurred there should have the effect, or does have the effect, under the facts as they exist, and under the law, whether it gave to these defendants the right to terminate the lease, to vacate the premises and terminate the lease.

This defense is one that is claimed they have the right to make by virtue of sec. 4113, Rev. Stat. That statute is as follows: "The lessee of any building which, without any fault or neglect on his part, is destroyed or so injured by the elements or other cause as to be unfit for occupancy, shall not be liable to pay rent to the lessor or owner thereof after such destruction or injury, unless otherwise provided by written agreement or covenant, and the lessee shall thereupon surrender possession of the premises so leased."

Early in the progress of the trial I had occasion to express an opinion as to one legal proposition that was submitted to the court, it being claimed that under the provisions of this lease there was a covenant to repair, even against loss by fire. I then expressed the opinion that the covenant in this lease to deliver up the premises in as good condition and repair as the same shall be put in by the second party at the commencement of said term, the natural wear and decay

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excepted, was not a covenant to repair as against a loss to the premises, or injury that might result to the premises by fire or by the elements—some extraordinary injury to the property like destruction by fire or by water, but was only a covenant to make such repairs to the premises as would ordinarily arise under the occupation of such premises—such as might ordinarily arise, but not an extraordinary condition resulting from destruction of the premises by fire or other unexpected and unusual causes; so that all I need to say to the jury now upon that subject is that the lease contains no provision that prevents the operation or application of this section of the statute in this case. Therefore it is a question that will be submitted to the jury as to what extent they were destroyed or so injured, and whether to that extent that they became unfit for occupancy. This being set up by way of defense the burden rests upon the defendants to establish by a fair preponderance of the testimony this allegation, this defense, namely, that the premises occupied under this lease were, without any fault or negligence on their part, destroyed, or so injured by the elements as to be unfit for occupancy.

Now, it is important for the jury, in the view I take of the case, to consider very carefully, all the testimony that has been presented here upon the trial bearing upon that question. You have been upon the premises, and by reason of that visit you are probably better able to appreciate and apply and understand the testimony as it has been submitted here upon the trial. The object of the visit was that you might better understand the testimony, not for the purpose of gathering facts there from which to make up your judgment, but to see the situation, so that you might understand the testimony as it should be given upon the trial.

Now, it becomes important for the jury to determine from the testimony offered here what was the condition of these premises immediately after the fire that is said to have occurred on or about the night of December 27, 1887. There is no question but that the property or premises leased covered Nos. 63 and 65 St. Clair street, which has been spoken of here as a double store, as I understand it, having four floors, and that it as well comprised two floors, being the upper ones in No. 67, in the building next adjoining Nos. 63 and 65. The testimony has been submitted here for the purpose of aiding you in determining the extent of the injury to the premises at that time. To what extent were they damaged by fire? To what extent were they injured? What was the effect of this fire upon the building, upon the premises occupied by these defendants? To what extent did it render them unsuitable for occupancy?

It is claimed on the part of the defendants that the fire extended to the burning out of one or more floors; that a large portion of the roof was destroyed, and that in the effort to extinguish the flames a large

quantity of water was thrown into the building, flooding, to some extent their premises, rendering it impossible, for the time being, to heat their building, flooding the cellar or the basement so as to put out the fire, and and that it affected or perhaps to some extent injured the heating apparatus, and from all that happened, or the result of the whole was to render these premises unfit for occupancy; that they were so destroyed or injured that they were, for that reason, unfit for occupancy.

On the other side it is contended that the extent and effect of this fire were not as claimed on the part of the defendants, nor was the effect of it to render these premises unfit for occupancy, claiming as to the double store that there was no fire in that part of the premises and that there was no general flooding of the building; that while there may have been some leaking of the water down the wall, and that the water, in some way, found its way into the basement, yet, it did not render the premises, for that reason, unfit for occupancy; that in No. 67, while the effect was to render it necessary to repair the floor in part upon the third floor and perhaps almost wholly on the fourth floor, that still it did not render the premises, as a whole, unfit for occupancy; that only a small portion of the roof had been destroyed, mainly the skylight, and that it was of such small dimensions, the part injured as compared with the whole, that it was in a condition that could be easily remedied, and that it did not constitute such an injury to the property as this statute is intended to meet; in other words, that it did not constitute such injury or such destruction as made, within the language of the statute, these premises unfit for occupancy.

Now, that, gentlemen of the jury, is a question of fact that you are to determine from the testimony submitted here and one that the court cannot aid you about. But there are some propositions of law that may be given as an aid to you in determining that question in the case.

Let me invite your attention again to the words of this statute, a part of this section: "The lessee of any building which, without any fault or neglect on his part, is destroyed or so injured by the elements, or other cause, as to be unfit for occupancy, shall not be liable to pay rent to the lessor after such destruction or injury," etc.

The question, then, is whether in this case there was such a destruction or such an injury to the premises by the fire and water—by what occurred at that time resulting from the fire—as that it became unfit for occupancy; because, to justify a lessee in abandoning premises, or insisting upon the termination of a lease, the injury or destruction must go to the extent of rendering the premises unfit for occupancy. It must amount to such destruction as that the premises are unfit for occupancy; not that there must be an absolute wiping out of the building—its absolute destruction from the face of the earth—but it must be such an injury or the injury must go so far toward total destruction as that it is no

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longer suitable to be used for commercial purposes, or for such purposes as it was fairly and reasonably designed to accommodate in its original construction. Mere temporary inconvenience occasioned by a fire would not justify or authorize a tenant to vacate premises, nor would it have the effect to terminate the lease. Mere inconvenience, the mere cessation or interruption to business for a day or two would not have that effect. It must go to the extent of rendering the premises untenantable so that the situation requires a removal elsewhere.

Now, it is hardly within the province of the court to indicate, I think, just what state of facts would justify a removal, or would justify the terminating of a lease. I only propose, in a general way, to give you general rules for your guidance. As I say, mere temporary inconvenience, a mere wetting of the walls by itself, standing alone, as a circumstance, the wetting of the floors, the mere putting out of the fire by flooding a cellar, if it could be removed within a short time, if the effects could be overcome within a short time—any one of these things alone would not constitute such destruction, or such an injury to the premises as would justify a lessee in terminating a lease. Those are all circumstances to be considered, however, together with other things, with a view of determining whether the building, as a structure, has undergone such injury and such destruction as a whole that it is no longer a structure suitable for the business for which it was designed. If this fire was of such extent and so destroyed these premises as a whole (and I now refer in what I say to the premises as a whole)—if they were injured to such extent that there was a burning away of the roof or of the windows that is spoken of as to make these premises, as an entirety, unfit for occupancy, unfit to be used in a commercial business, then it was the right of the lessees to vacate the premises and terminate this lease; it was their right to insist upon its being terminated, if such a condition of things occurred. If there was such a destruction or such injury, if it went to the extent that the building, as a whole, was untenantable, unfit for occupancy, then they would have the right, we think, under the statute, under this lease to insist upon its termination.

Now what do you find the fact to be upon the subject? What was the extent of the injury? Was it one that made this building, as a whole, untenantable, unfit for use? Did it go to such extent as that the business could not longer be prosecuted in that building, render it wholly impracticable to undertake to carry on the business in this building? Did it assume such proportions as to make it untenantable and unfit for occupancy? If it did not then these lessees are liable upon this lease for the payment of rent, and the fact that they moved out would not change that result; they would still be liable for whatever may be due upon the lease unless there had been an assent to their going, a surrender consented to, and that I do not understand to be claimed here; but that on the contrary this plaintiff insisted that they were still liable, that the con-

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dition of things did not justify a termination of the lease. But if it did go to the extent of rendering the premises unfit for occupancy within the rules I have given you upon that subject then they would not be liable for the payment of rent. Testimony has been offered tending to show that the greater part of the injury resulting from the fire occurred in No. 67, and it is claimed by counsel that even if the injury to 67 was of such a character as to render that portion of the premises unfit for occupancy, that it being a separate messuage or tenement in the sense of being a separate building, although embraced in the same lease, that there may be an apportionment here of the rent due; that is to say, that even if the part covered by No. 67 became unfit for occupancy that it did not follow necessarily that therefore the whole premises were unfit for occupancy, and that these lessees still should be held for the payment of rent for premises 63 and 65, provided the premises covered and known by those numbers were not so injured as to be unfit for occupancy. I have already said in substance, and will repeat it again so that you may have it in mind in connection with what I have to say on this subject. What I have already said relates to the premises as a whole, and no matter where the fire occurred, if it had the effect upon the whole premises to render them untenable, went to that extent and was so far toward a total destruction of the premises and constituted such an injury to the whole premises as to render them untenable and unfit for occupancy, then, as I say, there could be no recovery; that is, the defendants would have the right in such a case as that to terminate this lease. But I am disposed to say to you upon this subject as to the premises known as No. 67, that if the fire was of such extent as that it only had the effect to render the premises known as No. 67 unfit for occupancy or untenable, and the other premises did not sustain such an injury as to render those premises, Nos. 63 and 65, unfit for occupancy, if it did not go to the extent of making it necessary to abandon the whole premises, did not go to the extent of making it impossible to transact that business, as to render it impracticable to prosecute the business in the remaining premises, and they still could carry on the business there without serious or substantial interruption, then, we think, though the premises known as 67 were destroyed so as to be unfit for occupancy, it would not have the effect to terminate the lease as a whole lease, but would still leave the lessees liable to pay a proportionate part of the rent for the premises so left in a rentable or in a tenable condition. You will consider the situation as you find it from the proof as to the floors known as No. 67. To what extent were they injured? Was there a destruction there or an injury so as to render that portion of the premises untenable, without its affecting the other premises so as to render those untenable? If so, we think this rent may be apportioned, and that in the event you find the other premises still were left in a tenable condition, and that there is a liability to pay rent for that reason, you should then make such a deduc-

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tion as you would be justified in making upon the basis of whatever these premises were worth, that is, the premises known as No. 67, were worth as compared with the whole premises. Now, the testimony upon that subject is very meagre, and I do not know but I would be justified in saying that it is confined substantially to what is shown by the lease itself in this provision: "It is understood that if the first party be unable to get the third and fourth stories of No. 67 vacated by March 1, 1885, then the rent herein stipulated to be paid by this second party shall be reduced \$25 per month so long as they may be kept out of possession of said third and fourth stories, which time shall not exceed one year from March 1, 1885." That is perhaps the only evidence that would be before you as to what the two floors in No. 67 were regarded as worth as compared with the other premises, and what proportional part of the \$2,500 was made up of the rent of these two floors. But there is that circumstance or that fact before you. They have been spoken of there as, in certain contingencies, that an abatement should be made of \$25 a month. Should you have occasion to consider that branch of the case, in view of all that I may say to you, then you can look to that circumstance with the view of aiding you in getting at the facts on that question.

Now, I think I have said about all I deem is necessary to the jury in submitting this case to you. Quite a number of requests have been submitted upon both sides, but I believe I have practically covered all that is involved in the requests; that is, the subject has been covered, although I may not have given such propositions as counsel have requested.

There is one point perhaps I ought to mention to the jury that I have not spoken of thus far: If these premises were so injured, or if there was a destruction or injury to them to such an extent as that they were rendered untenantable and unfit for occupancy, the mere fact that the plaintiff offered to restore them and repair them would make no difference; they would still have the right to terminate the lease, if the injury went to the extent that I have indicated, if the destruction or injury went to the extent of rendering the premises unfit for occupancy so that the business could not be carried on there, so that the building was not longer suitable for mercantile purposes. The mere fact that the landlord offered to make repairs and restore them would not have the effect to prevent their acting upon their right to vacate, if such a condition of things existed.

Another thing was suggested upon the trial. Some inquiry was made of one of these defendants as to whether prior to this fire they were not undertaking or seeking to lease other premises, whether they were not making an effort to get out of those premises and into others and trying to relet these premises. I permitted some inquiries along that line, upon that subject, but simply as bearing upon the character and credibility of the witness of whom the inquiry was made.

Under the terms of this lease it was the right of Weil, Joseph & Co. to sublet the premises if they wished, not that the subletting would release them at all from the payment of the rent under their own lease. Unless their landlord accepted a sub-tenant in their place, they would still be liable to pay rent. The question was asked simply as it bore upon the credibility of the witness, and it was for that purpose it was admitted and for that purpose it is to be considered.

There being no controversy but that this lease was made for the period of time it was made, that the rent was for the amount stipulated and that it was paid up to the time of this fire, and that they occupied up to the time of this fire—the question being about the right to go out under the circumstances, that being set up by way of defense—the burden is upon the defendants to satisfy you that such a condition of things happened as that gave them the right to terminate the lease.

And the defendants at the time excepted the said charge as follows:

1. To that portion of the charge with reference to the extent of injury necessary to justify the defendants in abandoning the property and their being relieved from liability, and particularly to that part of the charge as to the injury being such that it was no longer a structure suitable for commercial purposes; that mere temporary inconvenience would not justify an abandonment, or a mere interruption of the use for a day or two, or that the situation must be such as to require a removal, or as to the extent of the injury being such as to make impossible or render impracticable the carrying on of the business.

2. To that portion of the charge on the subject of the apportionment of the rent between the portions known as Nos. 63 and 65 and the rooms over No. 67, and particularly as to the charge that if the rooms over No. 67 became unfit for occupancy and the other portion of the premises remained suitable for occupancy that the lease would not thereby be terminated, but that a proportionate part of the rent might be abated; and further as to the charge relating to the jury taking into consideration, upon the question of the amount of rent allowable upon abatement, the stipulation of the lease relating to the amount that should be allowed in case the defendants should not be able to get possession of the premises over No. 67.

And the said charge and the said special charge as hereinbefore stated, comprise all the charges of the court as given to the jury at said trial.

Whereupon the jury retired for deliberation, and returned a verdict for the plaintiff, as appears of record in the cause; and the defendants thereafter, within three days, filed a motion to set aside the said verdict and for a new trial, and the same was argued by counsel and submitted to the court, which, upon consideration, overruled the same and entered judgment upon said verdict, as also appears of record.

Mack v. Steinau.

EXECUTION—ASSIGNMENTS FOR CREDITORS.

[Hamilton Common Pleas, 1898.]

ALFRED MACK, ASSIGNEE, V. JENNIE STRINAU ET AL.

1. RIGHT OF POSSESSION BY SHERIFF OF GOODS TAKEN ON EXECUTION, NOTWITHSTANDING SUBSEQUENT INSOLVENCY.

The sheriff is entitled to the possession of goods and chattels taken on execution previous to the debtor's assignment thereof for benefit of creditors, and to sell so much thereof as may be necessary to pay the amount due on the execution.

2. SAME, NOTWITHSTANDING AGREEMENT.

The fact that an agreement is offered to the sheriff by the assignee that in consideration of the delivery of such goods to him to be sold, the lien of the judgment shall attach to the proceeds as to the original goods, and the proceeds be applied on the execution, and that such goods are of greater value than the amount due on the execution, and can be sold to better advantage by the assignee, is not sufficient for enjoining the judgment creditor and sheriff from selling the goods.

Simrall & Mack, for plaintiff.

Follet & Kelley, for defendants.

WILSON, J.

When goods and chattels have been taken by the sheriff on execution, and afterwards the execution debtor assigns all his property, real and personal, for the benefit of creditors, the sheriff is entitled, notwithstanding said assignment, to retain the possession of the goods and chattels and to sell the same, or so much thereof as may be necessary, to pay the amount due on the execution; Wright, 259.

The fact that the assignee has offered to the sheriff an agreement, whereby the assignee agrees in consideration of the sheriff delivering to him the goods and chattels taken on execution and permitting the same to be sold by him, that the proceeds of the sale shall take the place of the property, that the lien of the levy shall attach to the proceeds in the same manner and to the same extent as to the original goods and chattels, that the proceeds shall be applied to the payment of amount due on the execution, and the further fact that the goods and chattels taken on execution are of greater value than the amount due on the execution, and can be sold to a better advantage by the assignee than by the sheriff, is not a sufficient reason, the judgment creditor objecting, for enjoining the judgment creditor from further prosecuting his rights under said execution, or the sheriff from selling the goods and chattels, nor for the issuing of an order directing the sheriff to turn over the goods and chattels to the assignee. All the rights acquired by the judgment creditor by virtue of the levy are preserved to him, notwithstanding the assignment.

79 N. Y., 19; 70 Mo., 664; 66 Ind., 410.

Petition dismissed.

Hamilton Common Pleas.

ATTORNEYS—DISBARMENT.**[Hamilton Common Pleas, 1893.]****IN THE MATTER OF THE COMPLAINT AGAINST WM. F. CHAMBERS AND
WM. A. BOONE, ATTORNEYS.****DISBARMENT, ETC., OF ATTORNEYS.**

An attorney disbarred for procuring another attorney to antedate and cause to be executed and recorded an invalid deed suspended from practice for three years, and the attorney performing such acts through misapprehension of the circumstances censured.

OUTCAULT, J.

Written charges having been presented to this court against Wm. F. Chambers, an attorney at law, practicing at the bar of this court, involving the professional conduct of said Chambers in his said office of attorney and counsellor at law, this court on March 18, 1893, considering the same in joint session and being satisfied that the professional conduct of Wm. A. Boone, an attorney at law, was likewise involved, directed that J. B. Swing, Esq., and A. J. Marsh, Esq., attorneys and officers of this court, prepare and file written charges and specifications against said Chambers and against said Boone, in accordance with the statute in such cases made and provided, and to cause certified copies thereof to be served upon them, and fixed the fourth day of April following the hearing of the same.

The respondents being present in court in person and by counsel, and their answers in writing to said charges and specifications being read, testimony was heard and the cause argued by counsel and submitted to the court.

The court having carefully considered the same, and coming now to determine the cause, and to adjudge the truth of said charges, does find from the testimony of witnesses, proofs and exhibits, and the admissions of the respondents made in their answers filed to said charges, that the said Wm. F. Chambers and the said Wm. A. Boone are each and severally guilty of unprofessional conduct in his said office of attorney and counsellor at law, involving moral turpitude, in the manner and form charged and specified.

And coming now to pronounce judgment upon the conviction of guilt thus made, and to award and adjudge such punishment therefor as seems to the court just and proper in the premises, and the court doth adjudge and order that the said Wm. A. Boone be and he is hereby suspended from all practice in his said profession and office as attorney and counsellor at law at this bar for the period of three years from the date of the entry of this judgment upon the minutes of this court.

The court believing that the misconduct of which the said Wm. F. Chambers has been found guilty was not of his own conceiving, but was

In the matter of Chambers and Boone, Attorneys.

prompted and suggested by the said Wm. A. Boone, who knew that the charge upon his books against the property of said Thiering had been fully paid and discharged, and that the deed from Fred C. Schwartz to Frank Compton, of date of January, 1883, being made and recorded by and at the instance of him, the said Boone, was an invalid cloud upon the title to said property and of no force and effect in law, and of which facts the said Chambers was ignorant and purposely unadvised of by the said Boone, the ignorance of which facts, and consequent belief in good faith on the part of said Chambers, induced the belief, that in the transaction of March 2, 1892, with said Theiring, he had been wronged by the refusal of payment of the check given for the deed delivered to the said Theiring on said day (March 21, 1893), and that his act in preparing and causing to be executed and recorded the fictitious and invalid deed and mortgage, which, though executed March 3, 1893, were antedated and made to bear the date of February 6, 1893, was the result of the heat of passion and the lack of judgment and reflection, and in the light of his conduct subsequently, in righting his own wrong and admitting his error, this court considering his brief professional life and limited knowledge of the practice of the law, but in nowise attempting to palliate the character of the offense of which we find him guilty, doth adjudge and order that the said Wm. F. Chambers be, and he is hereby censured by this court for his said misconduct in office, and it is further ordered that the said judgment of censure be entered upon the minutes of this court.

And that the said respondents pay the costs of this proceeding, including an attorney's fee of \$50.00 to J. B. Swing, Esq. And it is further ordered that the foregoing be entered upon the minutes of this court as the judgment in this case.

KUMLER, J., dissenting.

There is no difference in the opinion of the court in regard to the guilt of the defendant. Indeed the facts upon which the charges and specifications are based are confessed in open court to be true. There is no escape from the conclusion announced.

Suggesting, executing, acknowledging, delivering, filing, recording, and antedating the fictitious deed and mortgage named are offenses not to be lightly overlooked or punished. I therefore take this occasion to express my dissent from the opinion of a majority to this court in respect to the amount and kind of punishment to be inflicted under the order of the court in both cases. In my opinion the punishment is not adequate to the offenses committed.

RECEIVERS—CONTRACTS.

[Hamilton Common Pleas, 1893.]

ALBERT McCULLOUGH V. MRS. CHARLES L. MITCHELL.

1. APPOINTMENT OF RECEIVER.

Where a receiver was asked for on the ground that a certain contract between plaintiff and defendant had been broken by defendant, in the absence of sufficient evidence showing that the contract claimed to be broken, was made, the appointment of such receiver will be denied.

2. CONTINUATION UNDER ONE CONTRACT—PRESUMPTION.

An agreement whereby the entire season's cut of flowers is to be consigned and that consignee is to retain twenty-five per cent. of the net proceeds on account, for bulbs, is quite different from an agreement whereby the entire cut of flowers is to be consigned and that consignee shall retain the entire net proceeds on account, and furnish money to meet consignor's pay roll, etc. Therefore, the continuation of transactions under the first contract after its termination would not raise a presumption of the subsequent contract.

3. SUPPLIES FURNISHED AND MONEY ADVANCED—PRESUMPTION.

The fact that supplies were furnished and money advanced, raises a presumption of indebtedness, but no presumption of any lien, on, or interest in, any property.

MOTION FOR RECEIVER.

L. C. Black and Daniel F. Wilson, for motion; C. F. Wilby, contra.

SAYLER, J.

The proof shows that certain negotiations having been had between the parties, the plaintiff, on September 19, 1890, addressed a letter to C. L. Mitchell, as manager for defendant, in which he says: "Our understanding is this, that you, as manager of the Oakley Rose Houses, agree to place your entire cut of flowers for the coming season in our hands for sale on commission; we, on our part, undertaking to obtain the best possible price thereon, and to render you regular account sales at stated times and cash remittances therefor, receiving as compensation for such services fifteen per cent. commission; furthermore, on the above agreement and understanding, we have booked your order for quantity of bulbs herein stated, same to be charged to your general account, and no reduction to be made from your sales the first thirty days, then twenty-five per cent. of the net sales to be retained by us until said account is balanced. Furthermore, at any time you may desire supplies we will furnish them to you on the same terms, and give you best prices, quantity and quality considered. If there is any point in the above that does not entirely correspond with your recollection of the conversation, we will be pleased to have it corrected at once, so there will be no cause for a misunderstanding in the future. Our main object now is to have it plain and distinct, so as to avoid unnecessary trouble." Then follows said list of bulbs.

McCullough v. Mitchell.

On September 22, 1890, Chas. L. Mitchell, as manager, wrote to J. M. McCullough Sons, in which he says:

"Your letter of the 19th inst. came duly to hand and states, we think, fully and accurately, the agreement between us as to sale of the cut of the Oakley Rose House for the season. It is understood, of course, that you will make an effort by advertisement and otherwise to find a market for the cuts and we shall do what we can to bring our customers to you. It is also understood that the Oakley Rose House will continue to sell to its few retail customers (not florists) until such time as it may in any way interfere with your wholesale trade, but that in such case this retail trade is to be discontinued."

The evidence shows this contract for the season of 1890, which included the balance of the year 1890 and a portion of the year 1891, was carried out by both parties.

The plaintiff claims that this contract was renewed with certain changes for the season of 1891-2, and for the season of 1892-3, and that during the season of 1892-3, the defendant ceased to comply with the terms of the contract, leaving a balance of some \$2,400 owing to plaintiff, and the plaintiff now asks that a receiver be appointed to take charge of the Oakley Rose Houses and the cut of plants and flowers growing therein and supplies furnished by plaintiff, to hold and manage the business, etc.

This matter has been heretofore passed on in this court and was taken to the circuit court on error. *Mitchell v. McCullough*, 4 Circ. Dec., 471. In passing on the matter in the circuit court Judge Swing said: "If there had been a breach of the contract as set out for the season of 1890-1, under the allegations of the petition, we think the court, under the law, would have been justified in the appointment of a receiver, for, under the law, as we deem it to be, the case is eminently one for a receiver, for in no other way could the rights of McCullough have been protected."

This determines the law of the case in the common pleas court, the plaintiff would have had a right to a receiver had there been a breach of the contract of 1890-1 by the defendant, and it follows that if the same contract was entered into for the season of 1892-3, the plaintiff will be entitled to a receiver if it be shown that there is a breach of it by the defendant. The circuit court held that the evidence did not show that the same contract was made for the season of 1892-3, and did not show what the contract for the season in fact was, and therefore held that the plaintiff was not entitled to a receiver.

The evidence shows that the defendant did, during the season of 1892-3, cease to place the cut of flowers in the hands of the plaintiff for sale, and that there is an indebtedness from defendant to plaintiff for supplies and moneys advanced to the defendant.

Clearly, therefore, the only matter now for me to determine is whether the same contract, or a contract with the same terms, or a contract with terms as effective, was in fact entered into for the season of 1891-2 and 1892-3.

The evidence in the affidavit of the plaintiff is to the effect that in April, 1891, the defendant, through her manager, verbally agreed with the plaintiff to renew the said contract of 1890-1, on the same terms and conditions, for the season of 1891-2, but that said contract was enlarged so that plaintiff was to furnish all of the seeds, plants, supplies of coal, oil, fuel, etc., needed in said Oakley Rose Houses, and to furnish money necessary to pay the pay-roll of the employees, and was to have the entire cut of plants and flowers for the season on the terms, to-wit, that after deducting a commission of fifteen per cent. for his services he was to retain the entire net proceeds to reimburse him for his advancements; that this contract was carried out for the years of 1891-2, and that in January, 1892, the defendant, through her manager, applied to the plaintiff to renew said contract for the season of 1892-3, and it was thereupon verbally agreed that said contract should be renewed.

The contract claimed to have been made for 1891-2, can hardly be called a renewal of the contract of 1890-1. By the contract of 1890-1, the entire cut of flowers was to be placed in the hands of plaintiff, the plaintiff to furnish bulbs and supplies (explained in affidavit of plaintiff, as supplies to the Oakley Rose Houses, for the purpose of stocking said houses and growing a cut of flowers); plaintiff to have fifteen per cent. as commission, and twenty-five per cent. of the net sales to be retained by plaintiff on account, balance to be remitted in cash.

By the claimed contract of 1891-2, the plaintiff was to furnish all the seeds, plants and supplies, coal, oil, fuel, etc., also money to pay the pay-roll; the plaintiff to have the entire cut or plants and flowers; plaintiff to have fifteen per cent. as commission and to retain the entire net proceeds to reimburse him.

The elements of the new contract are different from the old contract, and could not be established by a renewal of the old contract.

It is clear that after the expiration of the contract of 1890-1, the parties did continue to deal with each other; the plaintiff did furnish supplies and moneys to defendant, and the defendant did place in his hands the cut of flowers, and at all events, some plants for sale. The orders attached as exhibits make this manifest, and the plaintiff says that a contract as claimed by him, being a renewal of the old contract, with the enlargements, was entered into. No writing is claimed, and the language of the agreement is not given, only the substance of the result: the conclusion is stated, and the plaintiff says that in fact the supplies and money were furnished and advanced under such contract, and that said defendant applied to the plaintiff previous to the expiration of said sea-

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son of 1892-3, and that it was thereupon verbally agreed that said contract should be so renewed, and that thereupon, in January, 1892, and thereafter, the defendant applied for and received, on the faith of said contract and its renewals, supplies, etc., in large amounts. The plaintiff further says that at the time the contract was made with defendant, the defendant arranged with Jethro Mitchell to pay the pay-roll, and that under an order of defendant the plaintiff paid over to Jethro Mitchell the remaining seventy-five per cent., under the contract of 1890, till January, 1891, to reimburse him for the money so paid for pay-roll.

But the defendant in terms equally as strong denies that any modification of the contract of 1890-1, was made or renewed between the plaintiff and defendant in April, 1891, or at any time, for the season of 1891-2, or was carried out for said season; or that any renewal of said contract or any modification of it was agreed upon between the plaintiff and defendant for the season of 1892-3, or that the defendant applied to plaintiff to renew such a contract or modification prior to the expiration of the season of 1891-2, or at any other time, or that she applied for or received any supplies or advances on the faith of such contract; and says that after the termination of the contract for the season of 1890-1, the transactions between the defendant and plaintiff were those of buyer and seller on open book account, and the ordinary transactions between consignor and consignee, terminable at any time; that the consignments made to plaintiff during the season of 1890-1, satisfied the plaintiff of the value of those consignments, and that for the season of 1891-2, defendant continued to consign to plaintiff without any agreement whatever; and the plaintiff made advances to defendant during said season to enable her to pay her hands and purchase some supplies, but that said advances did not by any means cover all of the supplies or expenses of defendant's business for said season, nor did defendant consign all of her product to plaintiff, as plaintiff well knew.

An affidavit of Jethro Mitchell denies that he advanced money to pay the pay-roll of the rose houses, and states that the defendant was in arrears to him for rent, and gave him the order on plaintiff in order to pay the same. The letter of October 13, 1890, from Mitchell to the plaintiff, directing payment to Jethro Mitchell, does not state what the payments are for.

The testimony showing that after the close of the season of 1890-1, the plaintiff continued to furnish supplies and that defendant continued to consign to plaintiff, would be strong evidence tending to show a continuance of the relations theretofore existing between the parties, if it were claimed that there was a continuance of such previously existing relations. But it is not claimed that the contract of 1890 was continued; other contractual relations are claimed. The fact that supplies were furnished and money advanced, raises a presumption of indebtedness, but

no presumption of any lien on, or interest in, any property. An agreement whereby the entire cut of flowers is to be consigned and the consignee to retain twenty-five per cent. of the net proceeds on account is quite different from an agreement whereby the entire cut of plants and flowers is to be consigned and the consignee to retain the entire net proceeds on account. The continuation of transactions under the first contract after its termination would not raise a presumption of the subsequent contract.

The fact that the defendant did consign to plaintiff while in his debt, would raise a presumption, perhaps, that such consignments should be applied in payment, but would raise no presumption that he had agreed to continue making consignments to the plaintiff during the whole season.

It may be noticed in this connection that the advancements of money included advancements for purposes other than running the rose houses; they included money to pay taxes and family expenses.

Mr. Gillett says that he had knowledge of the contract and arrangement whereby the plaintiff made advancements to the defendant, upon the agreement that the entire cut of flowers of the Oakley Rose Houses was to be consigned to the plaintiff.

I think this refers to the agreement of 1890, as that provides for the consignment of the cut of flowers, and not the cut of plants and flowers, as claimed in the subsequent agreement.

He further says, "that in the fall of 1891 the foreman of the Oakley Rose Houses, one C. B. Ogston, left the employment of the said Oakley Rose Houses, and in that connection asked Mr. Charles L. Mitchell, manager, why he could not become his own foreman and take charge of the houses in place of the employee who had left; and that, in reply, said Charles L. Mitchell stated that he could do so, especially since he had agreed with Mr. McCullough that, as Mr. McCullough was to have the entire cut of flowers for the coming season, to-wit, the years of 1891-2, and he had agreed to furnish the money needed for pay-roll, as well as for other supplies," and that by this agreement Mitchell would be relieved of looking after the financial affairs, etc.

I think the evidence shows that Ogston left the employment of the Oakley Rose Houses in the winter of 1890, and before the time it is claimed the agreement for 1891-2 was made, and therefore that conversation must have had relation to the contract of 1890-1,

The evidence discloses that Mitchell advised with the plaintiff in regard to the management of the business; obtained an increase of advancement to pay extra men; in short, that the business relations were close; but aside from an agreement, all this would give the plaintiff no lien on, or interest in, the property of the defendant.

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If the proof of the plaintiff fails to establish the contract as claimed for the season of 1891-2, the claimed contract for the season of 1892-3, is not established, as the claim of the plaintiff is that the contract of 1891-2 was verbally renewed for the season of 1892-3.

In the language of Judge Swing, I am "unable to find from the record the evidence of the terms of such contract as would justify the court in the appointment of a receiver."

Motion for a receiver is therefore overruled.

ATTORNEY FEES.

[Hamilton Common Pleas, 1893.]

VON MARTELS & ROGOWSKA v. SCHMEISING.

1. RECOVERY FOR LEGAL ADVICE AS TO SUNDAY LAW.

Legal advice given as to duties, rights and liabilities under the Sunday law may be recovered for.

2. SAME—LEGAL SERVICES GIVEN ON SUNDAY.

Compensation for legal services rendered on various Sundays at the public resort of the client, by advice and presence to assist the client to "keep open" his saloon, cannot be recovered, for the reason that such services were part of a violation of law and for the reason that they were rendered on Sunday.

ACTION for recovery of attorney fees.

M. Rogowska, for plaintiffs.

Wilson & Herrlinger, contra.

BUCHWALTER, J. (Memorandum of charge to jury.)

For any services rendered the defendant at his request, in the matter of legal advice as to his duties, rights and liabilities under the Sunday law, the plaintiffs were entitled to recover; but that for the service on various Sundays at the public resort of the defendant, by their advice and presence to assist him to "keep open his saloon (as by giving legal opinion to the police officers for defendant's benefit) there can not be any recovery for the reasons:

First: Because the defendant was engaged in violating the law, and plaintiffs were, in assisting him to do so, jointly with him engaged in an unlawful enterprise.

Second: Because such services, having been wholly rendered on Sunday, and agreed to be then rendered, were not works of necessity, or charity, but were in a legal sense common labor.

MUNICIPAL CORPORATIONS—STREET RAILROADS.

[Hamilton Common Pleas, 1893.]

AYDROLE ET AL. V. CINCINNATI ET AL.

1. MISAPPLICATION OF CORPORATE FUNDS.

Advertising for bids is not a misapplication of corporate funds, where individuals have subscribed a sufficient sum to meet the expense thereof, and the sum is subject to the order of proper officials.

2. WHEN INJUNCTION WILL NOT LIE.

Injunction does not lie against the discretionary power of a city council to construct or regulate the construction of street railways.

3. SAME.

Injunction will only lie against that which has already been done, not against what may be done.

The court was asked to enjoin the city clerk from advertising for bids for the construction of a street railway, known as route 25.

Kittredge, Wilby & Simmonds; Paxton & Warrington; Foraker & Prior and J. J. Glidden, for plaintiffs.

Corporation Counsel Horstman, contra.

WILSON, J.

1. That the proposed advertising would not be, as claimed by the plaintiffs, a misapplication of corporate funds, for the reason that individuals desirous of having the road built have raised a sufficient sum by private subscription to meet the expense of advertising, and the money thus raised is subject to the order of the proper officials.

2. Nor will such advertising be an abuse of corporate power, even assuming for the purposes of this case that the ordinance is invalid, as claimed by the plaintiffs. The state has granted to the city council the right to construct and regulate the construction of street railways, and under the decision in Cincinnati St. R. R. Co. v. Smith, 29 Ohio St., 291, the discretion of council cannot be interfered with in the manner proposed. No bids having yet been received, it follows that none have yet been accepted or contract made for the construction of the road. The action is therefore premature. The relief asked is against action which it is believed council will take. But an injunction will only lie against that which has already been done, not against what may be done.

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MUTUAL FIRE INSURANCE.

[Lake Common Plcas, February Term, 1891.]

*CRANDALL v. FARMERS' MUTUAL UNION FIRE AND LIGHTNING INSURANCE ASSOCIATION

1. MUTUAL AND STOCK COMPANIES—DISTINCTION AS TO NOTICE.

A party insured in a mutual fire association organized under Secs. 3686, *et seq.*, Rev. Stat., becomes a member by signing the constitution and by-laws and is bound to know what its rules and regulations are while in old line or stock companies a policy holder is charged with notice of only such as are brought to his notice in the application or policy.

2. ASSESSMENTS PRESUMED TO BE NECESSARY.

Unless rebutted by proof to the contrary an assessment levied at a meeting of the board of directors and officers of a mutual insurance company for payment of losses and incidentals, will be presumed to be "necessary," within the meaning of that term as used in the policy or by-laws.

3. ASSESSMENTS MUST BE PAID WITHIN LIMIT.

No recovery for a loss can be had on a fire insurance policy issued to a member of a mutual insurance company organized under secs. 3686 to 3690, Rev. Stat., where he has "refused or neglected" to pay the "necessary assessments" thereon within the time limited by its laws, unless the condition as to the time of payment thereof has been waived or the time extended by the officers of the association.

4. WHEN PAYMENT NOT REQUIRED WITHIN LIMIT.

Where a member of such an association received notice from the secretary of the company directing him to pay the assessment levied to the collector, naming him, when he should call at his (assured's) house, the expiration of that time while waiting for the collector to call would not avoid the policy.

5. SAME—EXTENSION OF TIME.

And where the collector called, and informed assured that he would not be required to pay the assessment at once, if assured had reason, knowing the rules of the company, to believe that the collector had authority to extend the time, his failure to pay as first described would not avoid the policy.

*The judgment in this case was affirmed by the circuit court, February term, 1892, and by the Supreme Court, 52 Ohio St., 674, unreported.

*In the Supreme Court, Burrows & Jerome, for plaintiff in error, cited: May on Insurance, Secs. 63, 146, 147; Barrett v. Insurance Co., 7 Cush., 175; Buffum v. Insurance Co., 3 Allen 360; Hale v. Insurance Co., 6 Gray, 169; Brewer v. Insurance Co., 14 Gray, 203; Baxter v. Insurance Co., 1 Allen, 294; Smith v. Insurance Co., 19 Ohio St., 287; 16 Ency. of Law, 81; 86 Ills., 479; 5 Western Rep., 98—22 Mo.; Miller v. Insurance Co., 6 Central Rep., 324; Goff v. Insurance Co., 10 Dec., 86; 1 Disn., 355; Phoenix M. Ins. Co. v. Hoeffler, 1 Circ. Dec., 403; Pitney v. Glens Falls, 65 N. Y., 21.

*G. W. Alvord, for defendant in error, cited. 2 Herman on Estoppel, Sec. 1204, Rule 3; Pratt v. Insurance Co., 130 N. Y., 206-219; Miner v. Michigan Mutual Assn., 63 Mich., 338; 8 Am. St., 554; 71 Tex., 151; 114 Ill., 463; 78 Cal., 49; 81 Cal., 340; 71 Iowa, 689; 72 Iowa, 261; 54 Ky., 110-118; 69 Wis., 224; 146 Mass., 249-286; 67 N. Y., 478; 42 Me., 259; 25 Conn., 207-542; 116 Pa. St., 591; 50 Mich., 200; 64 Mich., 372; 106 U. S., 30-35; 96 U. S., 234 and 572; 44 Conn., 72; 78 Wis., 74; 111 Ind., 462; 16 Am. and Eng. Ency., 83, 84, notes 1, 2; 11 Am. and Eng. Ency., 308, 309, 310; 8 Am. St., 554; 17 Am. St., 660; 120 N. Y., 496; 19 Am. St., 772, note 783; Alexander v. Insurance Co., 67 Wis., 422; Marcus v. Insurance Co., 68 N. Y., 625; Dilleber v. Insurance Co., 76 N. Y., 567; Sheldon v. Insurance Co., 26 N. Y., 460-465; Devine v. Insurance Co., 32 Wis., 471-477; Howell v. Insurance Co., 44 N. Y., 276-283.

The plaintiff in error is a mutual protection or insurance association organized under secs. 3686 to 3690, Rev. Stat.

September 30, 1885, the defendant in error made application in writing to said association for insurance on his dwelling house and other property in Madison, Lake county. The usual form of policy was issued to him, October 4, 1885. August 4, 1887. Crandall received notice of an assessment made by the directors of \$3.50 on a \$1,000, amounting on his policy to \$4.55. The assessment was never paid by Crandall.

The dwelling house described in the policy was totally destroyed by fire March 27, 1888, more than six months after the assessment was by the terms of the policy and the by-laws of the association due and payable.

Crandall claimed that the time for payment of his assessment was extended by the collector to a period beyond the date of the fire or to such time as he could get the money and pay it.

Evidence as to such waiver or extension was introduced at the trial and the court left it with the jury to determine whether there was such extension. Verdict and judgment for defendant in error for the amount of his loss.

The members are directed by sec. 3690, Rev. Stat., to adopt a constitution and by-laws, which shall be binding upon all members alike. The constitution and by-laws are attached to the application for membership, which must be signed by everyone joining the association, and by signing the application the applicant signs such constitution and by-laws and agrees to be bound by them and becomes a member of the association.

Among other provisions found in the by-laws are the following:

Article 5, Sec. 1: All losses and expenses shall be paid by assessments levied for that purpose.

Article 6, Sec. 1: It shall be the duty of each member of the association within thirty days after receiving notice of an assessment to pay to the treasurer the amount assigned as his portion thereof.

Article 4, Sec. 4: Refusal or neglect to pay the necessary assessment will cause a forfeiture of protection in the association.

Article 8, Sec. 14: Any of the above by-laws of this association shall not be altered or modified except at an annual meeting, and then not without the consent of a majority of those present and voting.

Charge to the Jury.

CANFIELD, J.

Gentlemen of the Jury: The plaintiff in this case, Daniel Crandall, has filed his petition in this court against the defendant, The Farmers Mutual Insurance Company, of Thompson, Geauga county, Ohio, in which he alleges that the defendant is a corporation duly organized under the laws of Ohio for the purpose of insuring the property of the mem-

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bers of the corporation against loss or damage that may occur by fire or lightning, and that it is as such corporation doing business under the statutes of the state, and that as such a corporation the plaintiff became a member of the company on or about October 4, 1885, and that by the terms of a certain application made by him to the company for insurance, that he subscribed his name to the constitution and by-laws of the company, and asked for insurance as well as to become a member of the corporation, and that for and in consideration of the agreements and money paid by the plaintiff to the defendant, that the defendant accepted the proposition and issued a policy of insurance to him to secure and indemnify him against loss by fire or lightning upon certain property, that is mentioned in the petition, not only the dwelling house of the plaintiff and the household goods contained therein, but also a large amount of other property that is not in controversy in this action, the insurance claimed by the plaintiff amounting in all to the sum of thirteen hundred dollars; and the plaintiff alleges that on or about March 27, 1888, that the house thus insured by the defendant company was totally destroyed by fire, and that the personal property in the house, which was insured as claimed by the plaintiff for the sum of one hundred and fifty dollars, was also totally destroyed, excepting one sewing machine which was included, which the plaintiff claims was of the value of ten dollars, which was saved, that the balance was totally destroyed, and that he had performed all the conditions and stipulations required of him to be performed by the by-laws and regulations of the company, and he says that he is entitled to recover from the defendant the four hundred dollars, the insured value of the house, and the one hundred and fifty dollars, less the value of the sewing machine, which the plaintiff admits was saved, to be deducted from the one hundred and fifty dollars; so that what the plaintiff asks, in substance, by his petition is a judgment for five hundred and forty dollars, and the interest thereon from the time when it ought to have been paid according to the terms of the policy. That is the claim of the plaintiff.

The plaintiff also alleges in his petition that there had been an assessment made of four dollars and fifty-five cents the fall previous to the loss by fire of this property, and he says that such assessment had not been paid; and he gives as a reason why it had not been paid, that it was owing to the fact that the defendant had waived a strict compliance with the terms of the policy, or in other words they had not required it to be paid of him, that he was ready and willing to pay it and that he did tender the money to them after the loss by fire.

To this petition of the plaintiff thus interposed, the defendant has filed an answer to which I call special attention; the defendant first admits that it is a corporation, duly incorporated and organized, and is doing business; that it issued the policy to the plaintiff; the defendant also admits the destruction by fire of the property mentioned in the plaintiff's

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petition, and denies all other allegations and averments contained in the plaintiff's petition.

Further, the defendant says, and for a further defense, that on the _____ day of 1887, a necessary assessment was duly levied by said defendant on the policy holders and members of said association of three dollars and fifty cents on the thousand, making an assessment of four dollars and fifty-five cents on said plaintiff, payable on or before December 5, 1887, of which assessment the plaintiff was duly notified. The defendant then alleges in its answer that, by the terms of such policy issued to the plaintiff and the by-laws of said association, made a part of said policy, it was provided that a refusal or neglect on the part of any policy holder or member to pay any necessary assessment within thirty days after notice of the same, should cause a forfeiture of protection in said association.

That is the averment made by the defendant, that said plaintiff had failed and neglected to pay said assessment for more than thirty days after he had received due notice of the same, and had not paid the same at the time of said destruction of said property by fire, and that by reason of said failure and neglect, said plaintiff's right to protection on said assessment had been and was forfeited at the time of said loss by fire, wherefore he asks to be dismissed.

To these allegations, thus made, of new matter by the defendant the plaintiff has filed a reply in which he says, first, that he denies each and every allegation contained in the answer that would constitute a denial of the allegation in the defendant's answer that there was a provision in the by-laws of the company that neglect or refusal to pay an assessment for the period of thirty days after notice should cause a forfeiture of the right of protection to the insured; he further says that if any of the assessments were made and payable prior to said fire loss, which he does not know and therefore denies, said company duly waived payment of the same before, at the time and after same was so due, and that by reason of said waiver said assessment, if any, was not paid.

Now, gentlemen of the jury, the statute of Ohio authorizes the organization of insurance companies of the kind and character mentioned in the plaintiff's petition; the statute itself provides that a certain number of persons may join together for the purpose of protecting each other from loss or damage by fire, lightning, storms, and so forth. Another section of the statute provides, or the same section of the same statute provides, that they shall not be at liberty to issue any policy to any person except those who are members and have signed the constitution and the by-laws; so that it would be an authority exercised on the part of the state to permit companies thus to organize themselves together for the purpose of mutual protection, each person being a member of the corporation; and the following section provides that all persons who sign

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such constitution shall be considered and held to be members of the association and shall be held in law to comply with all of the provisions and requirements of the association. The statute also provides that the company also shall have power to pass by-laws and make such regulations as they in their judgment may determine will be for the best interest of the company.

And we say to you, as bearing upon this branch of the case, that the defendant in this action being a corporation, can only do business through its legally constituted and authorized officers, as provided by the statute under which they are organized, and so long as they act in accordance with the statute under which they are organized, and in accordance with the provisions of the constitution and by-laws authorized by statute, they have the right thus to act and are bound by it.

And the difference, so far as it applies in this particular respect, between what is called an old line or stock company and a mutual insurance company, where each and all of the members are themselves a part of the corporation, is simply this: In an old line company, as it is termed, where the party insured is in no way connected with, but is a stranger to the assurer, or the insurance company in which he is insured, then he is not presumed, in law to know anything as to what the rules and regulations of the company that insures him are, except in so far as they are brought to his notice by the application or by the terms of the policy of the insurance issued to him, while with a mutual insurance company, organized under the provisions of this statute, a person who becomes a member by signing the constitution and the by-laws of the company, is bound to know, being one of the company, what the rules and regulations of the company are; he is bound to know this at his own peril, for he is one of them as much as anyone else is, and the officers, in all that they do, in all their rules and in all of their regulations, are acting as much under his authority as they are under the authority of anyone else. If he himself has the power, as one of the members, to designate who shall be the officers, he is a part of the institution himself, and being such, is bound to know at his own peril what the rules and regulations of the company are.

Now the statute gave to this defendant company the right to enact its own constitution, not inconsistent with the laws of the state of Ohio; it gave them also the right to enact and be governed by such by-laws as the company composed of all the members should agree upon and determine, and I call your attention, gentlemen of the jury, to some of the causes that we deem material as bearing upon this branch of the case, and we would say to you here, that the application for insurance that is made, purporting to be signed by the plaintiff in the case, purports to contain a copy of the constitution of this company, as well as of the by-laws by which the company shall be governed and controlled, and the same con-

stitution and the same by-laws are copied into and made a part of the policy that was afterwards issued, but under and by virtue of the provision of the statute, no policy could be issued until the plaintiff had signed his name, as in the application it purports to have been signed, to the constitution and by-laws, and agreeing to be governed thereby.

Now, gentlemen of the jury, so far as the constitution itself is concerned it provides what the officers shall be and who may vote, how they may vote, how they shall be elected and what the objects of the organization are. The by-laws make various provisions in regard to the regulation and control of the company, and among those rules and regulations, thus purporting to be signed by the plaintiff, is one to which your attention has already been called by counsel in the argument, and to the court in your hearing, known as sec. 4, art. 4, the language of which, to which we wish to direct your special attention, is as follows: "Refusal or neglect to pay the necessary assessment will cause a forfeiture of protection in this association."

And first we will call your attention to this language, to the first part of the language, "refusal or neglect to pay the necessary assessments." The words "necessary assessments" mean such assessments as are necessary to be levied for the purpose of paying losses that have occurred during the year, and the incidental, legitimate expenses of carrying on the business of the corporation; that is what is meant by the term "necessary," and the presumption of law is that when the board of directors have met, together with the officers of the company and have determined upon what amount it was necessary to levy for the purpose of paying losses for the year and the incidental necessary expenses, then the presumption of law is that the amount that is thus levied by the corporation is a necessary assessment to be made, unless that presumption is rebutted by proof that it is not a necessary assessment. Then we say to you, gentlemen of the jury, you are to presume that such assessment was a necessary assessment, as no proof has been introduced tending to show in this case that this was not a necessary assessment.

I again call your attention to the language here used as bearing upon one of the issues that is made by the pleadings in this case; "refusal or neglect to pay the necessary assessments will cause a forfeiture of protection in this association." When, under this provision of the statute and of this by-law, would a refusal or neglect to pay the necessary assessment cause a forfeiture of protection in the association? In this sec. 4 of art. 4, there is no provision in express language that refusal or neglect to pay the necessary assessments within thirty days from the time notice is given will cause a forfeiture of protection in the association. Now the question would naturally arise in the mind of the jury and in the mind of the court, as to what length of time must this neglect or refusal continue in order to work a forfeiture of the right of protection to the as-

sured, or the plaintiff in this case; and in the absence of anything else, if there was anything else in the by-laws to explain this, we should say to you, as a matter of law, that after it had become due and payment had been demanded therefor, if payment was neglected or refused for an unreasonable length of time after such demand; in such case it would void or forfeit the right of the assured to protection; so that to speak in plain, direct language, if, after notice had been given of the assessment and payment demanded, if the assured waited or refused for an unreasonable length of time to pay the assessment without the consent of the company, then he would forfeit his right to protection under this section, for this does not specify any particular time within which it shall be paid.

But, gentlemen of the jury, this is to be taken in connection with another provision that is found in sec. 1 of art. 6 of the by-laws of the company; and in the latter part of that section we find this language: "It shall be the duty of each member of the association, within thirty days after receiving such notice, to pay to the treasurer the amount assigned as his portion of the assessment;" so that under this provision a member of this company, when he had received notice of an assessment, in the absence of anything else, it was his duty to see to it that the assessment was paid within thirty days from the time he received the notice; and if, without the consent of the officers of the company, he delayed it for a longer period than that, then we say to you, as a matter of law, that from the expiration of that time, if his buildings were burned or his property destroyed by fire, he would have no indemnity, although he might be a member of the company.

This provision proceeds further, and says that if any of the members fails to pay his or her assessment within the time specified, that is, the thirty days, the secretary shall call on the delinquent person or persons for the collection of the same, together with five per cent. for collection, and if the delinquent fails to make settlement the secretary shall proceed to collect the same with five per cent. additional. Now, so far as the plaintiff was concerned, if he was a member of this company and was insured in this company, and signed the by-laws and constitution, as authorized by statute, he was bound to take notice of each and all of these provisions.

Now, it is alleged by this plaintiff that this notice was issued, and perhaps there may be no controversy between counsel as to the time when this notice of this assessment was issued. Proof has been introduced tending to show by the postal mark upon the envelope, that this notice was issued from the office of the company on August 4, 1887, being the August prior to the time of the alleged destruction of the property by fire, and this notice has been read in your hearing, and under the constitution and the by-laws it was the duty of the plaintiff to have paid that assessment within thirty days, if the by-laws so provided, and he was

bound to know that such was their provision for the reason that he was a member of the company.

The notice which was issued and which was read in your hearing purports to show upon its face and upon the notice, the number of losses that the company had sustained during the previous year, for the payment of which it was necessary to make assessments upon the members of the company ; and, following, we find this language ; "your assessment according to the above rate is \$4.55, which please pay to E. B. Griswold, your collector, who will call at your house on the fifth day of September next or as soon thereafter as he can reach you ; by leaving the exact change at the house if you are not at home, will be a great help in saving expense, as the collector cannot call but once." I have only read this part of it. "Signed E. J. Clapp, Secretary."

Now, gentlemen of the jury, we call your attention to this provision of the notice, having said to you that in the absence of anything else it was the duty of the plaintiff to have paid the assessment within the thirty days, according to the terms of the by-laws of the company of which he was a member. Now I call your attention to this as bearing upon the question as to what the plaintiff had a right to understand from this notice, as to whether or not the officers of the company had any right to waive the payment of this assessment within the thirty days within which it was the plaintiff's duty to pay it.

Now, I find in the by-laws a provision that "the above by-laws of the association are not to be altered or modified except at an annual meeting, and then not without the consent of a majority of the members present and voting."

That is contained in sec. 14, art. 8. Section 13, art. 8, preceding this, provides, as a by-law, that the board of directors shall have authority to pass by-laws for the management and efficient working of the institution. So that the board of directors would have authority to make by-laws providing for the efficient working and management of the institution, and whatever the board of directors may have done, it would not be inconsistent with or a violation of the express provisions of these by-laws or of the statute, and would be binding upon the company as well as upon all its members, and if the board of directors or officers of the company should see fit to serve a notice upon a member that an assessment had been made, and should notify him at the same time, either directly or by implication, that he need not pay the same within the thirty days, but that he might pay it to the treasurer or collector after the expiration of thirty days, the fact that such member should wait, by reason of such notices, for the collector, to come to his house after the expiration of the thirty days, would not in law void the policy or work a forfeiture of the right of protection, for the presumption of law is, that if the secretary of the company issued a notice of that kind, like the one to which I have

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called your attention, in giving to the party against whom the assessment was made, the plaintiff in this case, the right to wait before he made his payment until the collector did call upon him, even if it was after the thirty days, he would not lose any of his rights; and the presumption of law would be that the secretary was acting under the authority of the board, and that they had passed some rule or regulation authorizing him thus to instruct members, and such a state of facts would not constitute a waiver of the right to protection during such time.

Now, gentlemen of the jury, we challenge your attention to this: When was it that this notice was served? Was it received on the fifth day of August? Was the party notified by the secretary of the company and was he asked to pay it to Mr. E. B. Griswold when he should call at his house on the fifth day of September, or as soon thereafter as Mr. Griswold was able to get there? If he was, and the plaintiff was then ready and willing to pay, there would be no waiver of his policy, for not only in law but in common sense, if a man is ready to pay his assessment to an insurance company as soon, to the person and at the time that the secretary shall direct him to pay it, there can be in such case no waiver of his protection, because he acts in accordance with what the secretary has told him he might do.

Now, we call your attention to the evidence bearing upon this branch of the case, and I say to you further, that if Mr. Griswold was acting as one of the officers of the company, as the treasurer, and called as the treasurer to collect the same, and the plaintiff had been directed by the secretary of the company to make the payment to Griswold as such treasurer, and he saw fit to extend the time for three days or a week, or for any reasonable length of time in accordance with any authority that he possessed from the company, that while the time was thus delayed or extended by the direct authority of Mr. Griswold, whom he was asked to pay the assessment, would not be a waiver or a forfeiture of the right of the plaintiff to protection during the time that he thus waited.

Now, it is claimed by the defendant that Mr. Griswold called upon him, and that is also conceded by the plaintiff in the case that he did call upon him, and whether or not there was any extension of time is for your determination; and as to how long an extension there was, if any, is for your determination. The plaintiff claims that he agreed to extend the time until he could pay the money at his convenience, or without distressing himself, which would be an indefinite period of time. Such an agreement as that would not bind or limit the company unless it was understood by the plaintiff at the time, and he had the right to understand from the collector or treasurer, that his rights would remain precisely the same.

If you should find that he only agreed to extend it for one week, or during the time that he was making the assessment in the township, and if

the party was ready and willing to pay it within that time, it would not work a forfeiture of the right of protection. And therefore you should examine the evidence as to what did transpire between Mr. Griswold and Mr. Crandall, as to any extension of time. What was the real understanding and agreement between these parties, taking all of the evidence that has been introduced in the case? Did Mr. Griswold understand, or did he say anything that gave the plaintiff the right to understand, that it would not make any difference if he did not pay that assessment until the following spring? That it might be extended to that time? And not only did Mr. Griswold say what he understood would give such a right, but did he say anything that gave to the plaintiff the right to understand that the time of payment of the assessment could be extended until the following spring, to-wit, after the fire? Did the plaintiff so understand it and did Mr. Griswold so understand it? It is for you to say.

Now, if Mr. Griswold said nothing which gave to the plaintiff the right to understand that payment could be delayed for the period of six months or more, and the plaintiff did not so understand it, if, after the expiration of the time that Mr. Griswold actually did understand and gave him the right to understand was given for the payment of this premium, loss occurred to the plaintiff by fire, the plaintiff would have no protection whatever under this policy. But if, on the other hand, you are satisfied that by fair understanding between each other, Mr. Griswold gave him to understand and he did understand that he could just as well let the matter be, it did not make any difference whether it was paid or not until the following spring, and the plaintiff, in good faith, intending to pay it, relying upon this agreement on the part of Mr. Griswold, upon what he had stated, acting in accordance with the directions and the notice of the secretary, that it would make no difference with his rights, we say to you, that in such case this might well be considered to be a waiver; bearing in mind, that in considering this you are to keep in mind that the plaintiff was bound to know what all the rules and regulations of the company were for the payment of assessments, and was bound to know the necessity for the payment of assessments by the members in order to pay losses that occurred. One man would have no superior right over another to an extension of time for the payment of assessments; they all stand upon an equality; but we say to you, that this is a matter that the jury are to determine under the rules that we have given you, from all of the evidence in the case. Was the time extended by Mr. Griswold and until after the fire, down to the time of the fire? And did the plaintiff so understand it or did the plaintiff in reading over the list of losses and the amount of the assessment, as claimed by the defendant, come to the conclusion that the losses were too heavy and that he would not pay the assessment, but let the insurance go? That is the claim of the defendant and it is for you to determine.

Crandall v. Insurance Association.

The claim of the plaintiff is that, relying upon the statements of Griswold, that he did intend to pay, and that while such intentions were in his mind, not having been called upon by the company, that the loss occurred, and therefore he ought to recover. That is the claim of the plaintiff.

What are the facts? Now, where a waiver is claimed, the burden of proofs rests upon the party who sets up the waiver, and in this case it is the plaintiff. The plaintiff must satisfy you, by a fair preponderance of the evidence, that the defendant did waive, or intend to waive, or at least did give to the plaintiff the right to understand that it would make no difference whether or not he made the payment of the assessment prior to the following spring or not. If you find that there was a waiver under these rules, then we say to you, that although the payment was not made, that the policy was still in force, that protection would not be defeated so long as the member acted in good faith, under the instructions of the officers of the company. All that any one could be required to do would be to do what the officers of the company required; and if that was plaintiff's understanding of it and Mr. Griswold gave him the right to so understand it, then the protection would not be voided.

Now, gentlemen of the jury, you will have these papers all in evidence before you, bearing upon this question, and under the rules of law that the court has given you and the by-laws and regulations of the company, you should determine this question as to whether or not there was not a waiver. There seems to be but little controversy between the parties, excepting so far as it relates to the question of the waiver, as to whether or not there was a provision in the by-laws of the company that neglect or refusal to pay for the period of thirty days would cause a forfeiture. We say to you that, in the absence of any waiver, refusal to pay within thirty days would cause a forfeiture of the right of protection, and that refusal to pay providing there was no waiver, but if the notice from the secretary did not require payment, but informed the plaintiff that he might have a period beyond the thirty days, that would be a waiver, and then he would be required to pay within a reasonable time after he was notified by the secretary and treasurer that the same should be paid.

The law requires that parties shall act in good faith toward each other and do and perform substantially what they agree to do; the law does not recognize any slight failure in the performance of a contract, but it must be of some importance, in order to void a contract, and we say that in determining this you should exercise your reason, judgment and common sense. Are you satisfied by a fair preponderance of the evidence in the case that Mr. Griswold did use such language as gave Mr. Crandall to understand, the right to understand, that the payment might be delayed until the following spring? If he did, and Crandall so understood it, and acted in good faith upon it, we say to you that the company would be bound by it and it would be a waiver, in the absence of any

Lake Common Pleas.

agreement that it must be paid within a reasonable time after the expiration of the thirty days. If there was no time fixed after the expiration of the thirty days, when the constitution and by-laws provided that it must be paid, then, as a matter of law, it might be paid when the company called for it, or within a reasonable time thereafter, or within a reasonable time after expiration of the time to which it may have been extended, if there was any extension of time. Now, if you find that there was a waiver, you should find for the plaintiff. If you fail to find there was a waiver your verdict should be for the defendant. If you find for the plaintiff there is but little controversy of the amount of your finding, which would be \$540.00, with interest according to the policy, as we understand from the counsel upon both sides, for no testimony has been introduced excepting two witnesses perhaps.

ADMINISTRATORS.

[Hamilton Common Pleas, 1893.]

MILTON SATER, ADMN., v. WILLIAM W. PEARCE, ADMR.

LIABILITY OF ADMINISTRATOR FOR WRONGFUL DISTRIBUTION.

Where an administrator made a wrong distribution of an estate, upon a finding that there were no such children as those designated in the will, and notice of the petition in the probate court was advertised but five weeks, when it should have been advertised for six weeks, the order is void for want of jurisdiction and the administrator and sureties on his bond are liable to the rightful distributees.

John F. Follett and Milton Sater, for the plaintiff.

Judson Harmon, contra.

The probate court entertained a petition from the first administrator of the McCleod estate for instructions as to who were entitled to take under the will. At the hearing the probate court found that there were no such children as those mentioned in the will, and that the widow was the sole legatee under the will. Afterward the children appeared and asserted their rights under the will. The notice of the pendency of the petition in the probate court was advertised five weeks, and in the proceeding brought by the children it was held by Judge Matthews and also in the circuit court (*Sater v. Kocher*, 6 Circ. Dec., 276) that the notice of the pendency of the petition should have been advertised six weeks, instead of five, and that the action of the probate court was premature, in that such a petition could not be entertained until an order of distribution had been made and the administrator found himself unable to comply with it. The present suit was then brought against the estate of the deceased administrator and his bondsmen, who became liable in the sum of \$15,000. The hearing was upon the merits.

Sater v. Pease.

SAYLER, J.

It seems to me that the points made in the brief of the defendants in this case are concluded by the decision of the circuit court in the matter of the estate of Joseph P. McCloud, deceased. Sater v. Kocher, *supra*. The defendants claim:

1. That the probate court had authority to entertain the petition filed under sec. 6198 *et seq.*, Rev. Stat. But the circuit court say in their opinion that sec. 6198, Rev. Stat., is not an independent section, but depends on sec. 6195, Rev. Stat., and that no settlement and order of distribution had been made as required by that section, and that this was necessary before the court could proceed under sec. 6198, Rev. Stat.

2. That the filing and approval of the final account and the lapse of thirty days thereafter are not jurisdictional. But the circuit court say differently as above stated.

3. That the proceeding was one *in rem* and that failure to give notice, does not deprive the court of jurisdiction, but is mere error. But the circuit court say that the probate court had no jurisdiction of the parties, because the notice was not in accordance with the statute.

4. That the court having jurisdiction, its judgment cannot be assailed as void because of defective notice, because the court found that due notice had been given, by order, of August 22, which does not specify what the notice was, but the circuit court say that the fact that the court finds that proper notice was given, should not be taken as true, when the record discloses the fact to be that no legal notice was given, and further that the probate court did not have jurisdiction of either the persons or the subject matter of the action.

5. That the proceedings being only erroneous, but not void, defendants in error could not proceed by mere notice as they did; but the circuit court say that the proceedings were void, and that a motion was the proper remedy.

And lastly, that as only the guardian of Mrs. McCloud was notified of the motion to set aside the order of the probate court, the order is still in force as a protection against the claim now made on the sureties on the bond of Converse; but the circuit court has held that the probate court did not have jurisdiction either of the person or of the subject matter and its proceedings are void.

If the court had jurisdiction neither of the parties nor of the subject matter, the proceedings would seem to be *coram non judice*, and would protect no one. 2 Ohio St., 223.

I quote from the report of the decision of the circuit court given on page 9 of printed brief in case of Sater v. Kocher.

I merely state these points but do not consider them; and refer the very carefully prepared argument submitted to me on them to the circuit court, which has authority to determine them.

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Following the judgment of the circuit court I will hold that the proceedings of the probate court being void, it was the duty of the administrator to distribute according to law and the will, and the court had no authority to designate the parties to whom distribution should be made. 39 Ohio St., 369; and that distribution not having been made according to the will, the sureties are concluded by the settlement in the probate court (44 Ohio St., 339), and that judgment may be taken against them on the bond.

REPLEVIN.

[Hamilton Common Pleas, 1894.]

STERN-BLOCH CO v. D. HEINSHEIMER, ASSIGNEE.

REPLEVIN—EFFECT OF REDELIVERY BOND—RETURN OF Goods.

In replevin, in Ohio, defendant by giving a redelivery bond admits that the property taken is the property mentioned in the writ, and when obliged to return the property, under a condition of the bond, must return the identical goods taken under the writ and cannot escape liability by saying that such goods are not the goods mentioned in the writ of replevin.

Samuel Wolfstein, for plaintiff.

Ramsey, Maxwell & Ramsey, for defendant.

In replevin. Motion for a new trial on the ground that the verdict is against the evidence.

WILSON, J.

The principal ground relied on is that the plaintiff did not prove that the goods and chattels taken were the identical goods and chattels described in the writ. The record shows that after service of the writ the defendant gave a redelivery bond, and that the property taken was returned to him.

In Pennsylvania, when a writ of replevin is issued, if the defendant has the goods, and the sheriff can take them, the defendant must either surrender them, or, if he chooses, he may claim property and retain them in his custody, giving bond to the sheriff for delivering them up, in case the property shall not be found in him; 1 Dall., 156.

It was held in 58 Pa. St., 200, that a defendant in replevin, who claims property in the goods mentioned in the writ, retains them and gives bond for their return and for indemnity, if the property in them be adjudged against him, conclusively admits that the identical goods mentioned in the writ were left in his hands. To the same effect are 28 Pa. St., 245; 4 Wharton, 500; 15 Serg. & Rawle, 1.

In Ohio the redelivery bond is given after service of the writ, and then the property taken is returned to the defendant. One condition of the redelivery bond is that the defendant will, in a certain contingency, return the goods taken. Having so obligated himself, he must return

Stern-Bloch Co. v. Heinheimer.

the identical goods taken and can not escape liability by saying that those goods are not the identical goods mentioned in the writ.

By giving the redelivery bond he has admitted that the property taken is the property mentioned in the writ. The defendant having admitted that fact, the plaintiff was not required to prove it.

Motion overruled.

LIBEL.

[Hamilton Common Pleas, 1894.]

*CINCINNATI STREET RAILWAY CO. v. CINCINNATI DAILY TRIBUNE COMPANY.

1. LIBEL—INNUENDO CANNOT CHANGE SENSE OF WORDS.

In libel, the innuendo cannot add to, enlarge, or change the sense of the words used, which should have their proper and legitimate interpretation, taken in the light of the extrinsic facts averred.

2. LIBEL WORDS CONCERNING STREET RAILWAY REPORTS OF EARNINGS.

Where a street railway company was required by its charter to report quarterly to the city auditor the amount of its gross income from the carriage of passengers, an article in a newspaper, containing the words, "conductors on the various lines have been noticed to smile when allusion was made to the returns made by the company to the auditor, upon which are based the calculations of the city's portion of consolidated earnings. It is said these returns do not by any means cover the real net income of the company. How or by what system of bookkeeping are the real returns arrived at for enlightening the stockholders on dividend day? There is only one method to be followed for correct accomplishments. That is, by the conduct of another complete set of books;" is capable of a construction charging the company with failing to make returns according to agreement contained in its charter, and of keeping two sets of books, and is libelous.

On demurrer.

Aaron A. Ferris and Rufus S. Simmons, attorneys.

SAYLER, J.

The plaintiff avers in the petition that the defendant is engaged in the publication of a newspaper of general circulation in this city, county and state; that the plaintiff is a corporation under the laws of Ohio and is engaged in operating a system of street railroads, of which it is the owner, in the city of Cincinnati and suburbs, under grants from the city of Cincinnati; that by the terms of the said grants it is required quarterly to make report to the city auditor of the city of Cincinnati, of the amount of its gross income from the carriage of passengers on nearly all of the roads composed in said system, and to pay into the city treasury of said city a percentage thereof in consideration of the grants to it for the privilege of constructing, maintaining and operating the roads comprising said street railway system; that it has, during the period it has operated said roads, made returns of the amount of its gross receipts to

*For decision on motion to make petition more definite and certain, see 1 Dec., 281.

Hamilton Common Pleas.

the auditor of said city; that it has a large capital invested; that its reputation and financial standing was good, etc.; that the defendant, well knowing the premises, contriving, etc., did wrongfully, etc., publish of and concerning the plaintiff a certain false, etc., libel, containing, among other things, the false, etc., matter following (in the head lines): "Double entry. Is that the method employed by the Consolidated? Is there one set of books for the use of the stockholders, and another set for the use of the city auditor at the city hall?" (And in the body of the article): "Right here enters a query that has bothered a good many people who are more or less conversant with the inside workings of the Consolidated office. Conductors on the various lines have been noticed to smile when allusion was made to the returns made by the company to the city auditor, upon which returns are based the calculations of the city's portions of Consolidated earnings. It is said, with more than a degree of seriousness, that these returns do not by any means cover the real net income of the company. Then how or by what system of bookkeeping are the real returns arrived at for purposes of enlightening the stockholders on dividend day? There is only one method to be followed for correct accomplishments. That is by the conduct of another complete set of books." Whereby the plaintiff has been damaged, etc., for which a judgment is asked.

To this the defendant demurs, on the ground that the petition does not state facts sufficient to constitute a cause of action.

It is claimed that the words are entirely consistent with a construction that is in no way libelous; that the keeping of two sets of books is consistent with an honest conduct of the business of the plaintiff, and that there is no imputation of dishonesty in the words as used; that it does not impute any crime to the plaintiff, in asking if there is one set of books for the use of the stockholders and another set for the use of the city auditor at the city hall; that there is no law against such method of bookkeeping; that the charge of keeping two sets of books does not necessarily imply or carry on its face that such was a dishonest method of keeping books; that it is nowhere said in the words that either set of books was false. And to sustain such construction, the defendant cite 40 Minn., 101, in which it was charged of a professional man, "that he has removed his office to his home to save expense," and the court held the words not libelous, because a professional man has a perfect moral and legal right to change the location of his office to his house, in his discretion, for any reasons satisfactory to himself, whether to save expense or otherwise, and that therefore there was no ground for any legal inference that he was degraded or injured by the publication. The court holds that, aside from special loss or damage, the nature of the charge must be such that the court can legally presume that the party has been injured in his reputation or business, or in his social relation, or has been

Street Railway v. Tribune.

subjected to public scandal, scorn or ridicule, in consequence of the publication. Ib., 102.

Also, 144 Mass., 258, in which an article stating that a dinner furnished by a caterer was "wretched," was served "in such a way that even hungry barbarians might justly object," that "the cigars were simply vile, and the wines not much better," was held not to be libelous. The court say that the words amount only to a condemnation of the dinner and its accompaniments, and that words, relating merely to the quality of articles made, produced, furnished or sold by a person, though false and malicious, are not actionable without special damage unless they go further and attack the individual. But disparagement of property may involve imputation on personal character and conduct, and the question may be nice, whether or not the words extend so far as to be libelous.

Also, 151 Mass., 50, in which the defendant is charged with saying of the plaintiff, a member of the legislature, "I am sorry that the representative from this district has changed his heart; sometimes (slapping his hands on his pocket), a change of heart comes from the pocket;" and the court held the words not actionable. The court says that the words do not fairly imply any actual fact which has happened at the time of speaking them and which involves corruption on the plaintiff's part, but only at most that, in the speaker's opinion, the plaintiff is corrupt in his heart, and open to pecuniary inducements; that the expression of such opinion about a member of the legislature is not actionable *per se*. The court, in speaking of the mode in which words are to be construed, say: "We are not to travel into the region of conjecture, but must confine ourselves to the words themselves, with the other facts contained in the declaration." Ib., 53.

Also, 114 Pa. St., 554, in which the words published of a street car conductor, that he had "been discharged for failing to ring-up all fares collected," were held not libelous, the court say, that the failure to perform the duty of ringing-up all fares might result from mere neglect, or inefficiency, or from motives of dishonesty; failing to ring-up all the fares collected, therefore, does not necessarily imply the fraud or dishonesty of the conductor; it does not import the commission of any crime.

It is well settled that the innuendo can not add to, nor enlarge, nor change the sense of the words. I therefore omit the innuendo contained in the petition, so that the meaning of the words may be determined unassisted by such innuendoes; the words should have their proper and legitimate interpretation (40 Minn., 103), taken in the light of the extrinsic facts averred (151 Mass., 53).

Now it will be noticed that the plaintiff is required to report quarterly to the city auditor the amount of its gross income from the carriage of passengers, and to pay a percentage thereof, in consideration of the grants from the city to maintain, etc., its railroad system. This is a

contract obligation. The article says that "conductors on the various lines have been noticed to smile when allusion was made to the returns made by the company to the auditor, upon which returns are based the calculations of the city's portion of Consolidated earnings. It is said these returns do not by any means cover the real net income of the company."

The natural meaning of these words would seem to be that the plaintiff had failed to make returns according to the terms of its agreement; that it had violated its contract obligation.

The article then proceeds, asking the question, "How or by what system of bookkeeping are the real returns arrived at for enlightening the stockholders on dividend day?"

This question can have no meaning whatever if the bookkeeping under which the returns are made to the city is correct, as in that event the stockholders could be enlightened from such bookkeeping.

Then follows the answer: "That is, by the conduct of another complete set of books."

This answer seems to strengthen the inference to be drawn from the question that the bookkeeping, under which the returns are made, is not correct. If there is only one method to be followed for correct accomplishment, viz., the conduct of another complete set of books, what is the natural inference as to the set of books under which the returns are made to the city? Clearly that such set of books is not correct.

The words seem to be "fairly capable" of this meaning. 151 Mass., 53.

It does not seem to me that the constructions given in the cited cases, or the reasoning of the court in either of them, militates against such construction of the meaning of the words.

It is claimed that the words do not make a direct charge that the plaintiff kept two sets of books for any purpose, but that the words are tentative, and while they suggest that the plaintiff did keep two sets of books, it is only a suggestion of a query.

I think this proposition is answered by Judge Hitchcock, in 7 Ohio, 255: "In many cases there is no more effectual way of destroying character than by dark insinuations; that the individual referred to is suspected; that this, that and the other say that he is guilty. In truth, this is the course more usually resorted^l to by him who is determined to inflict an aggravated injury upon his neighbor." See, also, Post Publishing Co. v. Maloney, 50 Ohio St., 71.

I hardly think these words spoken of the defendant come within the protection given to fair criticism of a public officer. 17 U. S. (4 Wheat.), 669; Post Publishing Co. v. Maloney, 50 Ohio St., 71.

If the above construction of the words be correct, I think there can be no doubt but that they are actionable *per se*. 1 Vent., 263; 3 Brigham, 104; 17 Johns., 217; 27 O. S., 295.

The demurrer will be overruled.

Geiser v. Heim.

REPLEVIN.

[Hamilton Common Pleas.]

DOROTHEA GEISER V. VAL. HEIM, SHERIFF.

1. REPLEVIN AGAINST SHERIFF—APPEARANCE—WAIVER.

In replevin against a sheriff, the appearance of the defendant for the purpose of obtaining an order to sell the property pending litigation, and to make new parties, and for the purpose of giving a redelivery bond, being only steps consistent with his duty to retain possession of goods to be sold on execution, does not amount to a waiver of a jurisdictional defense.

2. REQUISITES OF AFFIDAVIT IN REPLEVIN—JURISDICTIONAL DEFECT.

The failure by plaintiff in replevin to set forth in the affidavit that the property is not claimed under a title acquired mediately or immediately by transfer from one from whom such property had been taken by an execution order or process, as provided by Secs. 6613 and 5815, Rev. Stat., as amended, 88 O. L., 273, is a jurisdictional defect.

Maxwell & Creed, for plaintiff.

Tugman & Baker, for defendant.

BUCHWALTER, J. (Mem. of Opinion.)

The plaintiff brought an action in replevin before a justice of the peace of this county, November 30, 1891, to recover possession of certain chattels, upon which the sheriff had levied and had in his possession in proceedings to sell on an execution issued on a judgment against the plaintiff's husband. The plaintiff filed an affidavit containing the averments necessary under sec. 6613, Rev. Stat., as in force prior to the amendatory act of April 3, 1891, 88 O. L., 273, but did not contain the additional averment that the property "is not claimed by her under a title acquired mediately or immediately by transfer from one from whom such property had been taken by such execution order or process, * * *" provided by the amendatory act necessary to be contained in such affidavit in replevin. The justice issued his writ, founded on such affidavit, to the constable, who seized said chattels, caused them to be appraised and turned them over to the plaintiff, upon a bond being given by her in double the appraised value, on December 2, 1891. Summons issued to the sheriff, was served and the cause set for hearing December 5, 1891.

Thereafter the cause was continued various times, twice by consent of the parties, and other times by reason of sickness of plaintiff and the magistrate, until judgment was given, and defendant appealed therefrom in due time. In the meantime, however, the sheriff had appeared before the magistrate and given a redelivery bond in accordance with the provisions of the amendatory replevin act.

In this court, the sheriff offered, by motion, to obtain an order of court to sell the chattels, pending the litigation, and to make new parties, which motions were finally overruled. The plaintiff has filed his petition herein. The sheriff now moves to quash the writ in replevin and to dis-

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miss the action, for want of jurisdiction of the person of defendant and the subject matter.

The defendant waived the defect of service (which appears in the record, but not here set out), by his voluntary appearance.

But the court holds that the above appearances and the various steps taken by the sheriff, giving redelivery bond, etc., were but in the line of his consistent duty to retain possession of the goods to be sold on his execution, and not a waiver of his jurisdictional defense.

The court further holds, that the provisions of secs. 6613 and 5815, Rev. Stat., enacted by the amendment of April 3, 1891, 88 O. L., 273, requiring the affidavit to set forth that the plaintiff does not claim under a title acquired by transfer from one from whom such property had been taken by execution order or process, is jurisdictional and intended by the legislature to put a stop to a multiplicity of cross-replevins between the assignees of those who are then parties to causes pending in the court, and by the right of title to the same property, or those whose property has been taken to satisfy a claim in execution against such debtor.

It is as essential as the allegation in the affidavit that such property "was not taken in execution on any order or judgment against the plaintiff, * * * " etc.

It has been frequently held that such provision is jurisdictional and that a motion to quash the writ in replevin to dismiss the action, by reason of the defect in affidavit, or a demurrer, will lie.

The motion was well taken, and must be granted. Where the statutes provide the affidavits should thus allege. Dowell v. Richardson, 10 Ind., 573; Bridges v. Layman, 31 Ind., 384; McCoy v. Beck, 50 Ind., 283; Hines v. Allen, 55 Ind., 114; Westernberger v. Wheaton, 8 Kan., 179.

The motion to grant a writ and dismiss the cause at the plaintiff's costs will be granted.

Brueger v. Molique.

TRUSTS.

[Hamilton Common Pleas, 1893.]

BRUEGER V. MOLIQUE.

TRUSTS—TITLE TO PROPERTY ACQUIRED THROUGH ILLEGAL BUSINESS.

When two parties acquire property through an illegal business the title to which is taken in the name of one of them, the husband of such party who succeeds to such property by inheritance will be held to hold the other party's share in trust for his benefit. The fact that the property was acquired in an illegal business, is not, as between such parties, material and will not defeat an action to establish the trust.

Gholson & Cabell, for plaintiff.

Carr, Dengler & Spicer, for defendant.

The plaintiff and the defendant's deceased wife, while engaged in an unlawful business, acquired property which was taken in the woman's name. Following her death the plaintiff made a demand upon the defendant husband, to whom the property had passed by inheritance, for his share of it. The defendant denied that plaintiff could maintain a legal title in the property, because of the illegal business through which it was acquired.

WILSON, J.

Held: That as between the plaintiff and the defendant, the fact that the money with which the property was purchased was acquired in an illegal business cuts no figure in determining the rights of the parties to the present suit in the property. The plaintiff is therefore entitled to a decree declaring that the defendant holds the property in trust for his benefit to the extent of the share which he claims in it.

ADMINISTRATORS.

[Hamilton Probate Court, 1893.]

IN RE APPOINTMENT OF ADMINISTRATRIX.

ADMINISTRATRIX—WHEN WIDOW WILL NOT BE APPOINTED.

The probate court may refuse the application of the widow to be appointed administratrix of her husband's estate when it appears that such appointment would cause friction and unpleasant relations between her and the next of kin, and would interfere seriously with the best interests of the estate.

Application for the appointment of an administratrix in an estate where the issuing of letters to the widow was distasteful and objectionable to the next of kin. The appointment was resisted strenuously, on the ground that the widow was an improper person to administer upon the estate, on account of the inability of the persons most interested in

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to transact business with her, and in general to conduct the affairs of the estate in a business-like way.

The testimony showed an irreconcilable difference between the next of kin and the widow. There had been no relations of any kind between them for nearly twenty years, and the views entertained by the widow, as to the management of the estate, were radically opposed to those of the next of kin, and therefore it was that objection was made against the appointment of the widow, on the ground that such appointment was manifestly unsuitable for the discharge of the trust.

FERRIS, J.

Under sec. 6005, Rev. Stat., following the precedence of the court, the widow is entitled to letters of administration, unless, from the testimony, that such appointment, under all the circumstances, would be unfit or unsuitable; that the language of the first section of that act present the claims of the widow and the next of kin in one and the same class, and the decisions of the states of Massachusetts, Pennsylvania, Nebraska and others having a similar statute, leave it discretionary with the court to determine whether the appointment should go to the widow or to the next of kin, and do not give to either the absolute right to the letters of administration; and, as bearing upon the exercise of the discretion, the decisions in those states determine the right to appointment upon questions of peculiar fitness, competency and suitableness.

The question as to the right of administration in this state has been determined in favor of the widow, if she be competent and suitable, and that no appointment can be made passing over her right, unless it is made to appear that such an appointment would be an improper one.

The widow having applied for letters and that appointment being resisted, under all the circumstances, where it appears that the appointment asked would cause friction and unpleasant relations and would interfere seriously with the highest and best interests of the estate, and where the relations of the parties most beneficially interested in the estate are antagonistic to that of the widow, the appointment ought to be refused on the ground of its unsuitableness.

In support of this view the court cited, Cobb v. Newcomb, 19 Pick., 336; McGooch v. McGooch, 4 Mass., 338; Comp. St. Neb., 1887, chap. 23, par. 178; McClellan's Appeal, 16 Pa. St., 110-115; Gyger's Estate, 65 Pa. St., 311-313; Werner's American Law on Administration, vol. I, par. 242.

In the matter of Peter Craig, Deceased.

ADMINISTRATORS.

[Hamilton Probate Court, 1893.]

IN THE MATTER OF THE ESTATE OF PETER CRAIG, DECEASED.

1. ADMINISTRATOR CHARGEABLE WITH INTEREST.

An administrator investing funds of the estate so as to bear interest, is chargeable with the amount earned by the interest bearing fund.

2. AND WITH PROFITS FROM REAL ESTATE DEALS.

An administrator investing funds of the estate in real estate, which was sold at a profit, is chargeable with such profits.

3. COMPENSATION OF ADMINISTRATORS.

Failure of an administrator to properly administer an estate does not of itself afford reason for not allowing him compensation.

Application for allowance of compensation to the administrator, J. R. Baumes.

Goebel & Bettinger, for the administrator.

Reemelin & Reemelin, for the estate.

FERRIS, J.

1. The court finds from the testimony that a portion of the trust funds were so invested by the administrator as to bear interest. The order is that he be charged with the amount thus earned by the interest bearing fund.

2. The court finds from the testimony that a portion of the trust funds were used by the administrator in the purchase of real estate, which was afterward sold at a large profit. It is ordered that the amount of the profits from the real estate transaction be charged against the administrator.

3. As to the allowance of compensation to the administrator, the court follows the decision of the circuit court of this county, in *Campbell v. McCormick*, 1 Circ. Dec., 281, where it is held that failure to properly administer an estate does not of itself afford reason for not allowing him compensation.

INDEX.

ACCOUNTS—

An account rendered by one person to another and not objected to within a reasonable time, has the force of an account stated, and will be taken as correct, until shown to be incorrect, except where, when the account was sent, the parties had already come to a disagreement and assent from silence could not be reasonably inferred. *Goodhart v. Rastert.* 40

The acceptance of a note given for an open account, merely extends the time of payment of the debt; and if the note is not paid when due suit can be brought upon the note or the account. *Henderson v. Belford.* 640

The fact that plaintiffs were induced to accept notes in settlement of an account against defendants upon receipt of a letter representing that there was about to be an increase of capital stock, when there was neither intention nor expectation of increasing such stock, justified al plaintiff in disregarding the notes and suing on the original account. Ib.

The giving of notes by defendants in settlement of an account without intent to defraud, although knowing themselves to be insolvent, is not fraud in law, where there was no concealment of the insolvency, but simply a failure to disclose it, unless the insolvency was so gross as to lead to the presumption of an intent not to pay. Ib

Where an account was due for which notes were given to extend the time of payment, and the holder was induced to accept such notes by false representation, or fraudulent concealment by the defendant, the plaintiff had a right at once to sue upon the original account. Ib.

Suit may be brought upon an original account for which notes have been given and the time extended at any time, if, for any reason, the contract extending the time of payment is lawfully annul-

led or rescinded; and it is sufficient if the notes are returned at any time up to the day of trial. Ib.

A note given for an open account does not extinguish or discharge the account unless such is the express agreement of the parties, and the burden of showing such agreement is upon the debtor. Ib.

ACTIONS—

An action under secs. 6343 and 6344, Rev. Stat., to declare a conveyance and assignment for benefit of creditors void, is a civil action, equitable in its nature, and governed by the provisions of the code of civil procedure. *Jones v. Leeds.* 173

An action predicated on sec. 2676, Rev. Stat., bears a very close analogy to actions brought to recover on an implied promise for the value of property unlawfully appropriated to one's use is not one for tort. *Volk v. Board of Ed.* 35

ADVANCEMENTS—

Advancements are gifts by a parent *in praesentia* of a portion or all of the share of his child in his estate which would fall to it under the statute of distribution or descent, or come to it by will. *Woodruff v. Snowden.* 123

One of the criteria of advancements is that the gift or conveyance must be irrevocable, divesting entirely the ancestor's interest, so that the thing in question forms no part of the property to be administered. Ib.

See also BILLS AND NOTES.

ANNUITIES—

An annuity is a fixed sum granted or bequeathed, payable periodically, subject to such specific conditions as to duration as the grantor or donor may impose, and may, when the intention is expressed, be a charge on the real estate as well as on the person. *Krigbaum v. Irvine.* 226

Annuities — Arrest.

ANNUITIES—Continued.

A right to a faithful administration of the trust on the part of her trustee, but she is not, when misfortune overtakes the investment made for her under the direction of the will, whereby the income is reduced, entitled, after the estate has been distributed, to ask other legatees to refund a part of their legacies to make good her loss.

Ib.

APPEARANCE—

There is a presumption that an attorney in good standing has authority to enter the appearance of his client. The court has, however, a discretionary power to permit an attorney to withdraw an entry of appearance made without authority or under a misapprehension of his authority. Caldwell Co. v. Lumber Co.

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ARBITRATION—

It does not lie with a party to a contract of submission to arbitration to complain of an award against him on the ground that a finding in his favor on one of the matters involved was irregular, or that the arbitrators failed to concur, in finding facts essential to sustain one of the defenses to his right to recover. Corrigan v. Rockefeller.

494

While the question whether the depositions of individual arbitrators showing the manner in which they considered the questions and what their individual opinions were concerning the various matters before them are admissible is not free from doubt, the court held that, as it was probable the plaintiff had no right of appeal, and that there might be a question as to the correctness of the objection, it was advisable to give the plaintiff the benefit of all the evidence.

Ib.

Where the contract of submission to arbitration amounts to nothing more than a final award, it is competent for the arbitrators to make and deliver to the respective parties a statement of their findings of fact and law, and such findings are available evidence in behalf of either party, as showing all matters therein disclosed, and are competent to be resorted to by the court to determine the validity of the award itself.

Ib.

Where the contract of submission to arbitration provides that an award made in accordance therewith shall be final and conclusive, a court has no power to review either the findings of fact or law made by the arbitrators. As to these matters, the law leaves the parties where they have placed themselves by their agreement to abide by the judgment of the arbitrators.

Ib.

It is not essential to the validity of an award under a contract of submission to arbitration, providing, among other things, that "hearings may be adjourned from time to time and place to place by a majority of the arbitrators, but in all other matters all of them must concur," that arbitrators should concur in findings upon matters not involved in their award.

Ib.

ARREST—

Frivolous excuses or pretenses will not shield a police officer who arrests and imprisons a person without a warrant and without an offense being committed in his presence. Reidy v. Deitsch.

382

Where the superintendent of police has reasonable ground to order an arrest he is justified in having a picture of the person so arrested taken and placed in the rogues' gallery.

Ib.

Unless the superintendent ordered the photograph taken and placed in the rogues' gallery, no duty devolved upon him in respect to its removal until he knew that the photograph of such person, after he had been released, was in the gallery and he failed, after a reasonable length of time, to have it removed.

Ib.

A police superintendent who orders an arrest and detention is not liable in damages if there is probable cause for his action or if circumstances are sufficient to raise a strong presumption that the person has committed an offense or is a suspicious character, dangerous to the community, although it afterwards appears that the person so arrested is innocent.

Ib.

But when it appears that the person so arrested and photographed is innocent it becomes the duty of the superintendent to have his picture removed from the rogues' gallery, and if he thereafter allows

Arrest — Attachment.

such picture to remain there, he is liable for publishing a libel on such person. Ib.

A police superintendent is not liable in damages for the illegal acts of police officers under him in which he did not participate. The liability in such cases is upon the officers who committed the illegal acts. Ib.

ASSAULT AND BATTERY—

See IMPRISONMENT.

ASSESSMENTS—

Where, by error of valuation of a certain piece of property, the municipal authorities make the number of installments in which a sewer assessment is to be paid, less than they should be, whereby the yearly installments exceed one-tenth of the value of the property (the limitation by sec. 2272, Rev. Stat.), the invalidity of such installments beyond one-tenth is only as to the yearly collection and not as to the assessment itself. Cincinnati v. Kennedy. 64

The facts above stated are within the provisions of curative sec. 2289, Rev. Stat., relating to technical irregularities, and sec. 2327, Rev. Stat., requiring liberal construction.

And, where the cost of the improvement is reasonable, and the assessment is otherwise valid, the order should be that the assessment be paid in installments in conformity with the statute. Ib.

Such an extension of the time of payment does not render the assessment void for want of uniformity, where the assessment was levied upon all property by the same method and the yearly limitation is applied to all property. Ib.

The theory upon which the governmental right of assessment rests, is that there is supposed to be as much added to the value of the property by the special benefit of the improvement as the assessment levied and hence the security of the lienholder remains the same. A petition for an improvement is not, therefore, an interference with vested rights of existing lienholders. Donohue v. Brotherton. 47

A city council cannot legally order the improvement or repair of a street, and, after the improvement or repairs are made, assess its ex-

pense upon property owners. The determination to make the improvement or repairs and the determination to charge owners with the cost, must both precede the actual making of the improvement. Ib.

After an improvement has been made, without a determination to charge its cost upon abutting lots and without legislation to the end, abutting owners, after the attaching of a mortgage lien, cannot, by contract or by acts creating estoppel, charge the lots with an assessment lien which will have priority over the mortgage. Ib.

Persons dealing with, or lending money upon real estate must be deemed to do so with a knowledge of the paramount right of taxation and assessment, and, when such right is exercised according to law, taxes and assessments so levied become a lien prior to any and all others. Ib.

Property owners by signing a petition for a street improvement, and participating in legislation, whereby the corporation, in paying the expense of the improvement, parted with its money raised by an issue of municipal bonds and assessed the same per front foot on abutting lots, are estopped from denying the validity of the assessment. Ib.

ASSIGNMENTS FOR CREDITORS—

See INSOLVENCY.

ATTACHMENT—

The last clause of sec. 5521, Rev. Stat., read in connection with sec. 5523, and subdivision 3 of sec. 5048, Rev. Stat., contains provisions relative to attachment against non-residents, from which an intention to constitute non-residence a ground for attachment may and must reasonably be inferred. Gorham v. Steinau. 131

In an attachment case under sec. 5551, Rev. Stat., where the defendant is served by publication and the garnishee answers that he does not owe, although the existence of a *res* does not affirmatively appear, if such disclosure is unsatisfactory to the plaintiff, the latter is entitled upon default to a judgment for the entire amount due, in order that he may subsequently pursue such garnishee in an action under sec. 5553, Rev. Stat., which actions,

Attachment— Bills and Notes.

ATTACHMENT—Continued.

though separate in form, are on the doctrine of relation, to be treated as one proceeding. Caldwell Co. v. Lumber Co. 412

The appearance of the defendant for the sole purpose of objecting to the jurisdiction of his person is not a voluntary appearance; but any step, such as an objection to the jurisdiction of the subject-matter, or the authority of the court to enter the judgment (which are not well founded) or an objection to the finding of a *res*, is a waiver of the jurisdiction of the person, whether intended or not, and constitutes a voluntary appearance. Ib.

ATTORNEYS—

The doctrine of *uberrima fides* relates to an attorney, or a person in a fiduciary capacity, who gains some personal advantage at the expense of his client. Therefore, where it appears that a scheme of settlement was arranged between the debtor and his wife, represented by their attorney, and numerous creditors represented by the same attorney, all consented that such attorney should serve as trustee, and he acted in good faith, the doctrine does not apply. Case v. Hewitt. 365

An attorney for procuring another attorney to antedate and cause to be executed and recorded an invalid deed suspended from practice for three years, and the attorney performing such acts through misapprehension of the circumstances censured. Chambers & Boone, In re. 702

Compensation for illegal services rendered on various Sundays at the public resort of the client, by advice and presence to assist the client to "keep open" his saloon, cannot be recovered, for the reason that such services were part of a violation of law and for the reason that they were rendered on Sunday. VonMartels v. Schmeising. 709

Legal advice given as to duties, rights and liabilities under the Sunday law may be recovered for. Ib.

An attorney cannot by having himself appointed guardian *ad litem*, secure compensation for his services, to be taxed as aforesaid, because such services are not those ordinarily incident to the office of guardian *ad litem* and cannot, therefore be presumed to be within con-

templation of the statute. Worther v. Ruehrwein. 116

Although the filing of a petition for an accounting and to wind up the affairs of a partnership, or syndicate, all interests being antagonistic, injures to the general benefit, and, if there was a fund in court, compensation for filing the same might be allowed, the court has no authority to require judgments against the partners to include a *pro rata* share of plaintiff's counsel fees or to render an additional judgment for the attorney fee of any one party, acting on his own behalf, merely on the ground that he initiated the proceedings. Wehrman v. McFarland. 320

In actions of tort involving malice, fraud, insult or oppression, the jury may, in estimating compensatory damages, allow reasonable counsel fee of the plaintiff, even when there are mitigating circumstances not amounting to a justification. Kahn v. Cincinnati Times-Star. 599

See also APPEARANCE.

BANKS AND BANKING—

Where collateral is left with a bank as security for payment of a note, the bank cannot, upon renewing the note, credit the collateral against both the new note and other indebtedness of the maker to it, without the maker's knowledge or consent that the collateral is to be used as security for the other indebtedness; nor can the bank avail itself of the doctrine of set-off. Meyers In re. 121

Where collateral security is left with a bank for a particular purpose, the right of the bank to subject it is limited to the purpose for which it was received and the right of the bank to a lien for its general balance is excluded. Ib.

BILLS AND NOTES—

Where advancements are made, part of which are covered by a note, and payments are made on account, these payments should first be applied to the interest upon the entire indebtedness, and the balance over should be credited on the note. Smith v. Smith. 439

A note executed by husband and wife, the proceeds of which were largely used in perfecting the wife's musical education and whereby she was subsequently enabled to earn large sums of money, is good against the wife. Ib.

Bonds—Conspiracy.

BONDS—

A bond taken in a criminal case and approved by an officer without authority of law, does not constitute a common law obligation. Cincinnati v. Board. 104

A petition to recover on a bond taken from such defendant by the mayor, must aver that such bond was taken pursuant to an order of the common pleas court or a judge thereof. Ib.

If the clerk of the court, under a misapprehension of the effect of a bond tendered and accepted, declines to issue an execution, or recalls one issued, the judgment creditor has his remedy, not to appeal to the court, but also under sec. 4965, Rev. Stat., providing that the clerk "in the performance of his duties * * * shall be under the direction of his court." Leeds v. Peaslee. 567

A bond for stay of execution is the property of the defendant in error, and it is his right and duty to examine it to see if it is sufficient under the statute to stay the execution. A clerk of the court is under no duty to either prepare or pass upon the legal effect of the bond; and hence is not liable for damages should the bond prove insufficient to stay the execution. Ib.

Sureties on a bond of a member of the police force, under sec. 1882, Rev. Stat., can be subjected to liability only upon judgment against such officer. They cannot, therefore, be joined in the original action against the officer for damages. Reidy v. Deitsch. 382

BOYCOTT—

See TRUSTS.

BRIDGES—

Whether a structure eighteen feet high, extending over a street and across a river, with draw bridges in it, is a bridge, within the meaning of sec. 3365, Rev. Stat., requiring railway companies to block guard rails except upon bridges, or a trestle, is a question for the jury, to be determined in view of the nature and object of the structure, the situation of the place, the use to which it was put, the surroundings and all the circumstances. Johns v. Railway Co. 348

BUILDING AND LOAN ASSOCIATIONS—

A director of a building association, who receives deposits from members who are employees under him, without authority directly or indirectly from the company, acts as agent of the members and not as agent of the association. Hasselmeyer v. Loan & Building Co. 570

CHARGE TO JURY—

The statutory prohibition (sec. 5190) against any qualification, modification or explanation of a written charge to a jury applies to charges given before argument as well as to charges given after argument. Cincinnati v. Lochner. 596

The law will presume injury where such prohibition is violated. Ib.

To make a failure to give written instructions to the jury before argument, available on error, it must appear affirmatively that they were requested, and that exceptions were taken to the refusal to give them. Ohio Mut. Life Assn. v. Draddy. 591

CLERK OF COURTS—

Under sec. 1264, Rev. Stat., all the clerk has power to do is to select or procure such books and supplies as he may need, when, in the discretion of the commissioners as to the amount paid and whether the supplies are necessary, the bill may be allowed upon the clerk's certificate. There is no binding obligation on the county until the bill has been allowed by the county commissioners. Lyle Printing Co. v. Highland Co. 89

If such bill is allowed by the county commissioners, and it then becomes necessary to appropriate money for the payment thereof, the provisions of sec. 2834-B, Rev. Stat., requiring the auditor's certificate that the money is in the treasury to the credit of the fund from which it is to be drawn, or has been levied and placed on the duplicate and is in process of collection, and not appropriated, must be complied with. Ib.

CONSPIRACY—

See TRUSTS.

Constitutional Law — Contracts.

CONSTITUTIONAL LAW—

The proper practice, to raise the question as to whether a statute under which an indictment is found, is in conflict with federal or state constitutions and whether the facts alleged constitute an offense against the laws of the state, is by demurrer. *State v. Bateman.* 68

There is necessarily implied in the right of personal liberty and the right to contract, the right of the employer, when the employment is at will, to discharge and to refuse to longer employ a member of a labor union; and also the right of a member of a labor union to quit the service of his employer; and neither is under obligation to satisfy the other that the reason for his action is a good one. *Ib.*

Section 1, art. 1 of the constitution of Ohio, declaring that every person has an inalienable right to liberty and to acquire, possess and protect property, guarantees to every person the right to make and enforce all proper contracts and to employ, in carrying on his business, such persons and such lawful means as he may choose, free from all restraints except such as are necessary for the common welfare. *Ib.*

The act of April 14, 1892, secs. 4364-68, Rev. Stat., providing that it "shall be unlawful for any individual, firm, agent, officer or employee of any company or corporation, to prevent employees from forming, joining and belonging to any lawful labor organization, and any such individual, member, agent, officer or employee that coerces or attempts to coerce employees, by discharging or threatening to discharge from their employ, or the employ of any firm, company or corporation, because of their connection with such lawful labor organization, shall be guilty of misdemeanor," etc., is in conflict with sec. 1, art. 1, of the constitution of Ohio. *Ib.*

The act in question cannot be sustained as a valid exercise of the police power of the state, inasmuch as the subject-matter in no way affects the public welfare, health, safety or morals. *Ib.*

To constitute an "attempt to coerce," the means employed must have some adaptation to accomplish the intended result. A discharge is not such an act as is calculated to coerce and does not constitute an "at-

tempt to coerce" within the meaning of the act referred to. *Ib.*

The acts which the statute in question declares to be unlawful and punishable, are the discharge by an employer of his employee, or the threat to discharge him because of his connection with a labor organization. The words "coerce" and "attempt to coerce" are the statutory names of the two separate offenses. *Ib.*

It is not within the power of the state legislature to superadd anything to the qualifications of members of the congress of the United States. *State v. Russell.* 255

The provisions of the act of April 8, 1896, 92 O. L. 123, entitled, "An act to prevent corrupt practices at election," in so far as it relates to the office of representative in the congress of the United States, is unconstitutional. *Ib.*

The act of April 8, 1896, 92 O. L. 123, entitled "an act to prevent corrupt practices at election" is valid in so far as it applies to officers elective under the laws and constitution of the state. *Ib.*

Under the rule that a law may be valid in part and invalid in part, if such parts may be separated, a resolution of a city council directing a committee to investigate charges of corruption in awarding a certain contract is valid to the extent of directing the investigation, although, as an authorization for the expenditure of money, it may be invalid without the prerequisites required by law for such resolutions. *Steuer v. McConnell.* 573

See also POLICE COURTS; INSOLVENCY; WITNESSES.

CONTRACTS—

While a contract in contravention of good morals, or of public policy, is absolutely void, *inter partes*, so as to prevent the recovery back of any consideration paid thereunder, *quaere*, whether the vice of the contract extends so far as to taint the right of a bona fide creditor to subject such consideration to the payment of his debt. *Barbour v. Boyce.* 428

A corrugating iron company by contracting to furnish such material for a building becomes liable for damages, occasioned by the blowing off of a roof, resulting from furnish-

Contracts.

ing unsuitable and insufficient cleats and rivets. *Block-Pollak Iron Co. v. Iron Co.* 51

A corrugating iron company having contracted to furnish material for a building on a certain date is liable in damages for delay; and the measure of such damages includes the wages of men employed by the contractor and whose enforced idleness was occasioned by the delay in furnishing material. *Ib.*

The rule of damages for the violation of a contract to labor for a year, is the difference, between the contract price and the market value of the services of the employee at the time of quitting his employment. *Foredyce v. Easthope.* 610

The contract of a minor is voidable, notwithstanding it is in writing, and he may at any time before reaching his majority, or up to, or even at that time, disaffirm his contract and set it aside; but the burden is upon him to prove his disaffirmance thereof. *Ib.*

A written contract for services for one year exists where defendant in a letter to and received by plaintiff proposed to hire the latter to labor for him for a year at \$180.00, and the plaintiff by letter accepted the proposal without condition or reserve. *Ib.*

Under a contract to work on a farm for a year, voluntarily laboring in excess of a day's labor, without compulsion on the part of the employer, will not justify an employee in quitting his employment during the year. *Ib.*

Specific performance of contracts relating to personalty will not ordinarily be decreed. Exceptions to this rule have been made when the value of the chattel withheld was peculiar to itself, or where damages in money could be ascertained, or where the detention could not be adequately redressed by damages. *Glesenkamp v. Radel.* 559

Where vendee of personalty, who had disposed of same, so that it could not be replevined, agreed to sign notes and give a chattel mortgage, and refuses to do so, this constitutes a breach of his contract, for which a suit for damages will lie; and the measure of damages would be the price of the property sold. There is, therefore, in such case, where it does not appear that vendee

is insolvent, a full, complete and adequate remedy at law. *Ib.*

The intent of a party to the contract need not necessarily be determined by his own testimony, but may be determined from all the evidence, direct and circumstantial. *Goodhart v. Rastert.* 40

Where a contract is made for the manufacture of a specified article for which there is no market, in the ordinary legal sense of that term, and the manufacturer, after beginning work thereon, is notified by the customer that he will not carry out the terms of the contract, it is the duty of the manufacturer to go no further in the manufacture of the article, but to accept the breach and recover such damages as he has sustained. *Grand Rapids Furniture Co. v. Robinson.* 98

Under a contract between the owner and manager of a theatrical company and the proprietor of a theatre, whereby the former agreed to play at the theatre for the week beginning on a certain date and the latter agreed to furnish the theatre, well lighted, etc., without negative covenants on the part of either, the owner and manager of the theatrical company, upon refusal of the proprietor of the theatre to comply with his agreement, is not entitled to an injunction restraining the proprietor of the theatre from permitting any other performance to be given during the week in question. *Hill v. Anderson.* 432

An agreement whereby the entire season's cut of flowers is to be consigned and that consignee is to retain twenty-five per cent. of the net proceeds on account, for bulbs, is quite different from an agreement whereby the entire cut of flowers is to be consigned and that consignee shall retain the entire net proceeds on account, and furnish money to meet consignor's pay roll, etc. Therefore, the continuation of transactions under the first contract after its termination would not raise a presumption of the subsequent contract. *McCullough v. Mitchell.* 704

The fact that supplies were furnished and money advanced, raises a presumption of indebtedness, but no presumption of any lien, on, or interest in, any property. *Ib.*

Where a contract based upon an illegal transaction has been executed the court will not rescind it nor give

Contracts—Corporations.

CONTRACTS—Continued.

relief against its terms; and where it is executory it will not enforce it. *Wheelock v. Bank.* 622

A contract based upon suppression of criminal proceedings is illegal and parties entering into it for that purpose are in *pari delicto*, and neither can have relief against the other. *Ib.*

Where the condition or position of two contracting parties is glaringly unequal, and the mind of one is overborne by the other, they are not on an equality of guilt, and the rule of *pari delicto* will not apply. *Ib.*

See also MUNICIPAL CORPORATIONS.

CORPORATIONS—

A widow and devisee, who, without electing to take the stock, as executrix sells to herself, individually, the stock in question, and, through her attorney, has the same transferred to her upon the books of the company, and permits her name to remain upon the books as a stockholder, is bound by the principles of estoppel although the sale may be absolutely void as to other parties. *Biggio v. Sandheger.* 316

Persons who subscribed for stock in the Union Banner Brewing Company cannot be held as stockholders in the Banner Brewing Company, although their names appear on the stock books of that company, where there is nothing in the evidence tending to show that such persons had knowledge of the fact or knowingly permitted their names to remain on the books of the Banner Brewing Company as stockholders. *Ib.*

The true principle upon which the legal owner, as distinguished from the equitable owner, of shares of stock in a corporation is held liable to creditors, is based upon the ground of estoppel. Where persons permit their names to appear upon the books of the company as the legal owners, the law will presume that creditors dealt with the corporation upon the faith of the individual responsibility of the stockholders who so appeared as the legal owners of the stock. *Ib.*

The foregoing rule does not apply where stock in a corporation is held in a trust or fiduciary capacity

and the fact that it is thus held is disclosed by the stock books of the company. In such cases the creditor must be charged with notice of the fact that the party whose name appears upon the registry is not the real owner. *Ib.*

A party who subscribed for shares of stock in the Union Banner Brewing Co. cannot be held for stock in the Banner Brewing Co. where it appears that upon discovering the fact he entered into a verbal agreement to take merchandise for the sum subscribed, from which it is fair to infer that the stock was to be canceled. *Ib.*

A corporation whose assets are only one-fifth of its liabilities is insolvent. *Carter Cattle Co. v. McGillin.* 146

A probate court in this state has power to appoint a trustee of an insolvent corporation, provided such insolvent has property within the state. *Ib.*

Where such an insolvent corporation attempts to prefer creditors by giving notes, which notes are reduced to judgment, such judgments are conclusive and fraudulent and can be attacked in a collateral proceeding. *Ib.*

Under sec. 3239, Rev. Stat., relating to the organization of corporations, there is no power conferred to convey property beyond the requirements of the corporation to effect the objects of its incorporation. *Ib.*

Where certain creditors of an insolvent corporation bring an action to set aside judgments based upon notes given by such corporation to prefer creditors, the adjudication of such issue cannot affect the rights of other creditors who had no part therein. *Ib.*

Where the disability of an insolvent corporation to prefer creditors, is organic, it has no power in another state to prefer creditors, although its property is located there, and such preference is not forbidden by the laws of such other state. *Ib.*

The disability of an Ohio corporation to prefer creditors after it becomes insolvent and ceases to prosecute the objects of its creation, is organic; and from the moment of such insolvency all power to convey its property ceases, and all its prop-

Corporations — Courts.

erty becomes a trust fund, held by the directors as trustees: first, for the creditors; second, for the shareholders. And the claim of creditors will be enforced by converting all persons, except *bona fide* purchasers for value, into trustees, and compelling them to account for the property. Ib.

General legislation of the sovereignty creating a corporation is not determinative of the power or capacity of a corporation, but the language of its charter is so determinative. Therefore, in determining whether a corporation has a given capacity, reference must be had to its organic form, as evidenced by its charter. Ib.

Where a petition for the dissolution of a corporation, on the ground that it is for the best interests of the stockholders, and for an order under sec. 5672, Rev. Stat., requiring directors to file inventories, accounts and statements, is opposed by other stockholders, denying the allegations of the petition, the court should give the parties an opportunity to be heard before making any order. Fitch v. Carriage Co. 341

The renewal of notes by a corporation after the sale or transfer of stock by a stockholder do not release the stockholder from liability thereon, although the renewals were made without his knowledge or consent. Hauenschild v. Coffin Co. 536

A petition in an action by stockholders against a corporation to restrain it from certain acts and for the appointment of a receiver to wind up its affairs, alleging that there was no officer, director or stockholder to whom plaintiffs could go to secure redress is sufficient, without showing that a request to have their rights adjusted was first made to the corporation. Kuhn v. Woolson Spice Co. 292

The registered owner of a share of stock in a corporation, which he holds as trustee for the real owner, is a proper party plaintiff under sec. 5005, Rev. Stat., in an equitable action against such corporation, the officers and directors thereof, and another corporation, for the appointment of a receiver for the first corporation, to wind up its affairs and to restrain a sale of the stock of the first corporation to the officers of the second corporation although the

real owners of such share of stock are also joined as plaintiffs. Ib.

Equity will not entertain a bill by stockholders in a corporation asking aid to one monopoly as against another, or interfere with the laws of trade, permitting one party to drive another party out of business by underselling him. Ib.

A corporation organized solely for the purposes of a charity hospital, having no capital stock and declaring no dividends, and using its income, derived from voluntary contributions, except in certain cases where a reasonable amount is charged for board, room and nursing to those who are able to pay, in the management of the hospital, is not liable for injuries to a pay patient through the negligence of a nurse, where it does not appear that the corporation was negligent in the selection of its servants. Conner v. Sisters of St. Francis. 86

COSTS AND FEES—

A defendant in a criminal case, whose conviction in the court of common pleas was reversed by the circuit court, is entitled to recover of the county, as costs, fees which he was required to pay to the official stenographer for a transcript of the evidence on the trial in common pleas, in order to secure same in time to get his case into the circuit court. Martin v. Clinton Co. 287

COUNTY SURVEYOR—

See OFFICES AND OFFICERS.

COURTS—

It is not the province of courts to relieve against the mistakes or omissions of the legislature, however unwise or unjust may be the consequence. Therefore, if a reasonable intention can not be fairly inferred from any language used in the statute, the courts must construe accordingly. Gorham v. Steinau. 131

A *nisi prius* judge will not disregard the holding of the Supreme Court that "a judgment of dismissal without prejudice is not a judgment from which an appeal may be taken under sec. 3 of the justice act," notwithstanding the claim that so far as the subject of appeals is concerned that declaration is an *obiter*. Strauss v. Jacobs. 132

Courts—Deeds.

COURTS—Continued.

Jurisdiction of the subject matter of an action is not conferred by the filing of an answer by the defendant, and his appearance for trial. Ib.

While the legislature has the power, under sec. 8, art. 4, of the constitution, to establish a court, it has no power to confer upon such court other than judicial functions. Zanesville Tel. & Tel. Co. v. Zanesville.

134

Where in a trial upon a charge of a criminal offense, it becomes material to prove upon the part of the state that a conspiracy existed between two or more persons, one of whom is being tried for the offense, evidence that the same persons were, shortly prior to or shortly after the alleged crime, engaged in a conspiracy to commit crimes of a like character, is competent. State v. Jacobs. 252

CREDITORS' BILLS—

A creditor's bill cannot be maintained under the statute or under the general chancery jurisdiction of the court upon a claim which is not susceptible of being reduced to judgment. Males v. Murray. 373

CRIMINAL LAW—

The rule that an indictment must aver, with reasonable certainty, all the material facts which are necessary to be proven to procure a conviction, which has not been changed by the code of criminal procedure, applies to prosecutions in police court based upon affidavits. Hummel v. State. 492

If there is any relaxation of the rule as to magistrates generally, it is as to matters of form only. The charge, whether in affidavit or indictment, must allege in some form, with reasonable certainty, every material fact necessary to be proven to procure a conviction, which includes every fact essentially necessary to a description of the offense. Ib.

In criminal prosecutions for using or uttering obscene or licentious language or for libel or profane swearing, enough of the language should be set forth and such other proper allegations as are necessary to show that a crime has been committed. Any thing less than this renders an affidavit or an indictment fatally defective. Ib.

An affidavit in a prosecution for using obscene and licentious language in the presence or hearing of females, under sec. 7026, Rev. Stat., that accused "being over fourteen years of age, did unlawfully and wilfully, utter and use obscene and licentious language, unfit for allegation herein, in the presence and hearing of females" fails to charge an offense. Ib.

DAMAGES—

The measures of damages in an action for personal injuries includes compensation for loss of time, physician's fees, reasonable expenses incurred, to effect a cure, necessary expenses for nursing, an allowance for physical suffering or pain sustained and endured by reason of the injury and also compensation for loss of earnings by reason of the permanency of his injury. Connors v. Golding. 614

DEBTORS AND CREDITORS—

A debt, without special provision in regard to payment, is payable at any place; and, hence, may be attached at the domicile of the debtor, although the creditor's domicile may be elsewhere. Barbour v. Boyce. 428

In proceedings by a judgment creditor to reach assets of the debtor, the burden of proof is on the plaintiff to show that the assets mentioned are the property of the judgment debtor. Carter Cattle Co. v. McGillin. 146

Renewals of notes, or changes in the form of the evidence of a pre-existing debt, do not create a new debt or operate as a discharge or satisfaction of the old debt, unless it is so expressly agreed between the parties. Hauenschild v. Coffin Co. 536

See INSOLVENCY.

DEEDS—

The voluntary execution by plaintiff of a deed of her lands to the holder of paper forged by her husband and father and brother for the purpose of stifling a criminal prosecution against them, is not duress for which the conveyance will be set aside where it appears that the conveyance was made by procurement of the wife, under advice of counsel and upon due deliberation and with-

Deeds—*Estoppel*.

out extortion upon the part of the holder of the forged paper. *Wheelock v. Bank.* 622

See also FRAUD AND FRAUDULENT CONVEYANCES; REAL PROPERTY.

DELIVERY—

Delivery, in its legal significance, comprehends two things: a tender of the goods on the part of the vendor and an acceptance on the part of the vendee. When these two acts concur, title is transferred. *Bank v. Cincinnati.* 545

DEPUTY STATE SUPERVISORS OF ELECTIONS—

See OFFICES AND OFFICERS.

DESCENT AND DISTRIBUTION—

The real estate, acquired by descent from a paternal ancestor, or one who dies intestate leaving neither widow, children, brothers, sisters nor parents, passes, under sec. 4158, Rev. Stat., to the brothers and sisters of the father, or their legal representatives, whether such brothers and sisters are of the whole or half-blood of the father. *Burdick v. Shaw.* 533

Where one owes money to an estate and is bound to increase a *residuum*, which is a mixed or blended fund, or the general mass of the estate, by the payment of his indebtedness, he cannot claim an aliquot share given to him out of that mass without first making the payment or contribution which completes it. The executor has the right to pay such indebtedness out of the general fund in hand. *Woodruff v. Snowden.* 123

DURESS—

See DEEDS; EXECUTORS AND ADMINISTRATORS.

ERROR—

A waiver of summons and error, and entry of appearance by an attorney of one of the parties, is an entry and appearance of such party. *Cowie v. Meyers.* 91

The members of the Mt. Auburn & Avondale Land Syndicate, an unincorporated land syndicate, are members of a partnership, and therefore, since the members of a partnership, are united in interest, the service of summons in error up-

on one of such members, saves the proceeding in error as to the other members not served, but the other partners should be served before the case is heard. *Ib.*

Section 4987, Rev. Stat., providing that an action shall be deemed commenced as to each defendant, at the date of the summons which is served on him or on a codefendant who is united in interest with him, is applicable, by analogy, to petitions in error. *Ib.*

All the parties to a joint judgment are necessary parties to a petition in error by one of them; and while omitted parties may be brought in by amendment, such parties must nevertheless be brought in within the period for filing petitions in error or the reviewing court will have no jurisdiction. *Loewenstein v. Rheinstrom Bros.* 587

The individual rights or interests of an executor, who is not an heir, devisee, legatee or creditor of the estate, and is interested therein only as executor, are not prejudiced by an order of removal, under sec. 6017, Rev. Stat. Such executor cannot, therefore, prosecute error for the reversal of the order relieving him of the trust. *Munger v. Jeffries.* 12

ESTOPPEL—

Estoppel in pais does not arise against one who seeks to recover expense incurred in shoring up his building to protect it against an excavation by his neighbor to a depth of twelve feet, said shoring up having been done and paid for by plaintiff before the twelve-foot excavation law was declared unconstitutional, and in the belief that it was a valid law. *Eggers v. Reemelin.* 588

Neither the payment into the city treasury of the purchase price of the outside part of the plant, nor the resolution of the council directing the gas trustees to deliver the property to the purchasers, constitutes a defense to an action, under sec. 1777, Rev. Stat., prosecuted for the benefit of tax-payers, proceeding upon the theory that the city is abusing its corporate powers, or is about to execute a contract in violation of law; until the property is delivered to the company the transaction is not completed and if the

*Estoppel—Franchises.***ESTOPPEL—Continued.**

contracts are illegal no question of estoppel can arise. Kerlin Bros. Co. v. Toledo. 509

EVIDENCE—

Notwithstanding fraud must be proved and not presumed, there is a presumption that every reasonable man expects and intends the ordinary and probable consequences of known causes and conditions. Henderson v. Belford. 640

The rate of speed is a fact to be established like any other fact. The statement of a witness that the train was "fast," without testimony as to the usual rate of speed, is not such evidence as furnishes data by which the judgment of a jury can be applied and the rate of speed determined as a basis for the charge of negligence, even if there are other facts connected with the case which might properly be submitted to the jury. Watson v. Railroad Co. 454

It is not sufficient to merely introduce a document required by law to be attested, and then rest, when objection is made; the defendant is entitled to proof of the execution of the document; and failure to require such proof constitutes reversible error. Schaupp v. Jones. 597

See also **FRAUD AND FRAUDULENT CONVEYANCES.**

EXECUTION—

The sheriff is entitled to the possession of goods and chattels taken on execution previous to the debtor's assignment thereof for benefit of creditors, and to sell so much thereof as may be necessary to pay the amount due on the execution. Mack v. Steinau. 701

A person holding an equitable lien on real estate cannot enjoin a sheriff from proceeding to sell the property upon a judgment and execution against the owner of the fee, the judgment creditor not being made a party to such proceeding. Schubert v. Taylor. 585

EXECUTORS AND ADMINISTRATORS—

Where an administrator made a wrong distribution of an estate, upon a finding that there were no such children as those designated in the will, and notice of the petition in the probate court was advertis-

ed but five weeks, when it should have been advertised for six weeks, the order is void for want of jurisdiction and the administrator and sureties on his bond are liable to the rightful distributees. Sate v. Pease. 722

The probate court may refuse the application of the widow to be appointed administratrix of her husband's estate when it appears that such appointment would cause friction and unpleasant relations between her and the next of kin, and would interfere seriously with the best interests of the estate. Administratrix, *In re.* 731

Failure of an administrator to properly administer an estate does not of itself afford reason for not allowing him compensation. Craig, *In matter of Est.* 733

An administrator investing funds of the estate so as to bear interest, is chargeable with the amount earned by the interest bearing fund. Ib.

An administrator investing funds of the estate in real estate, which was sold at a profit, is chargeable with such profits. Ib.

Devisees cannot be charged with the laches of the executrix of the estate. Woodruff v. Snowden. 123

An executor obtains no title and has no power to convey real estate unless there are words expressly granting him title, and then only for the purpose of realizing money to pay debts or as a trustee to carry out designated trusts. Helmig v. Meyer. 368

FELLOW SERVANTS—

See **NEGLIGENCE.**

FORFEITURES—

Whatever may be the nature or kind of forfeiture, it is never carried by construction beyond the clear expression of the statute creating it. Ackerman v. Thompson. 361

FRANCHISES—

"Franchise," in a general sense, is a liberty or privilege, a particular privilege conferred upon individuals by grant from the government. They are usually held by corporations created for the purpose of enjoying them. Morrow County Illum. Co. v. Mt. Gilead. 235

Fraud and Fraudulent Conveyances—Habeas Corpus.**FRAUD AND FRAUDULENT CONVEYANCES—**

Unless it appears that grantee acted from corrupt motives, the fact that he withheld a deed from record for a long time is not material. *Hedrick v. Gregg.* 462

If, however, the conveyance at the time was made with the intent to defraud the creditors of the grantor, a subsequent creditor may avail himself of this fraudulent character of the conveyance and have it set aside. *Ib.*

Declarations by grantor in deed of conveyance, made after the conveyance and in the absence of the grantee, are not admissible evidence in derogation of the title conveyed in the deed, unless collusion or conspiracy between the parties, that the deed was executed for fraudulent purposes, is shown. *Ib.*

A conveyance of land, where the grantor has ample means left to satisfy all debts he has at the time of such conveyance, will not be set aside as fraudulent on the petition of a subsequent creditor, unless it is shown that such conveyance was made in contemplation of becoming a debtor of such subsequent creditor. *Ib.*

The purchase of goods by an insolvent buyer, who conceals his insolvency with intent to injure the vendor is fraudulent and voidable, but a purchase under like circumstances, save that such intent is absent, is not in law fraudulent. The simple failure to disclose a condition of insolvency does not imply a purpose to defraud. *Henderson v. Belford.* 640

In a proceeding in aid of execution to reach choses in action based on a transfer of property, any creditor of the transferee may intervene to have such transfer set aside on the ground of fraud; it is not necessary in such case that the intervening party be a judgment creditor. *Carter Cattle Co. v. McGillin.* 146

An existing creditor at the time of the conveyance, a voluntary conveyance of property of value, and an unsustained burden of proof to show grantor's solvency at the time of making such conveyance, are elements which go to make up a conveyance constructive fraudulent and within the class of cases covered by sec. 6344, Rev. Stat., authorizing ac-

tion by creditors to declare void acts of an insolvent debtor. *Jones v. Leeds.* 173

A party bound by a contract upon which he may become liable for the payment of money, although his liability be contingent, is a debtor within the meaning of the statute avoiding all grants made to hinder or delay creditors. *Ib.*

When there is no actual intent to defraud, a valuable consideration, though inadequate, will sustain the transfer in a court of law. *Ib.*

Where a conveyance by its terms operates to hinder, delay, or defraud creditors, the intent to do so is imputed to the parties, and no evidence of intention can change this presumption. *Ib.*

See also EVIDENCE.

GAMING—

Where the contract is a mere form to evade the law, and there is no *bona fide* sale or purchase, it is the duty of the jury to tear away the disguises and treat the transaction as it is. *Goodhart v. Rastert.* 40

To constitute a gambling transaction, both the parties to the contract must intend to gamble. *Ib.*

The sole test by which the legality of a sale (relating to stocks and bonds in case at bar) is determined is: was the sale *bona fide*? Did the parties really contemplate a sale on the one side and a purchase on the other? If they did the sale is legal, without regard to the question whether the purchaser bought for speculation or the seller originally purchased the property for the same purpose. *Ib.*

GAS COMPANIES—

See MUNICIPAL CORPORATIONS.

GUARDIAN AND WARD—

A guardian *ad litem* in an action of tort cannot have an allowance made to him for attorney's fees to be taxed in the costs and paid by the opposing unsuccessful party. *Worther v. Ruehrwein.* 116

HABEAS CORPUS—

See IMPRISONMENT.

Hamlets—Injunction.**HAMLETS—**

Where two petitions are filed with the township trustees upon the same day, though at different hours, each asking that an election be held upon the question of establishing a hamlet within the boundaries of the township, the trustees have discretionary power to determine which petition they will direct a vote upon, and, in the absence of fraud or bad faith, their action in directing a vote upon the petition last filed is not invalid. *Lawrence v. Mitchell.*

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The provisions of secs. 1561a, 1561b and 1561c, Rev. Stat., authorizing the establishment of hamlets under the supervision of township trustees, are not unconstitutional, as being an unauthorized delegation of legislative power. *Ib.*

Where an election and the proceedings preliminary thereto, under secs. 1561a, 1561b, and 1561c, Rev. Stat., for the establishment of hamlets are subject to a review, it cannot be said that such election will work irreparable injury to the inhabitants, or warrant an injunction to restrain the election. *Ib.*

Under secs. 1561a, 1561b, and 1561c, Rev. Stat., providing for a petition to township trustees for the establishment of a hamlet, and proceedings thereunder, the same remedy is given as when the proceedings are brought before the county commissioners for the establishment of hamlets out of "allotted territory." Such proceedings are, therefore, subject to review, and, for proper cause shown, to reversal. *Ib.*

HEIRS—

An heir or devisee of an estate has the right to compel the filing of an inventory of the estate, but it is not his duty to do so. *Woodruff v. Snowden.*

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HUSBAND AND WIFE—

See **BILLS AND NOTES.**

IMPRISONMENT—

Where imprisonment, as part of a sentence upon conviction of assault, is imposed "until the fine and costs are paid," it is the duty of the court to add "or secured to be paid or he be otherwise legally discharged." Without these words the judgment would be equivalent to a life

sentence and would be illegal. Sec. 7327, Rev. Stat. *Mullaney, Ex parte.*

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And it is the duty of the auditor, in a proceeding under sec. 1028, Rev. Stat., when it is made to appear that a person imprisoned until a fine and costs are paid is unable to pay, to at once discharge such person; and he is not excused from such duty by a finding "that the petitioner had friends or relations who are able and should be willing to help him in the emergency." *Ib.*

Where, upon conviction of assault, the judgment of the court is that accused "pay a fine of \$5.00 to the state of Ohio and the costs of this proceeding," and it is made to appear that accused has no means to pay the fine, he is entitled to be discharged at once. The public prosecutor, nor any other official has no authority to supplement such judgment by an order of imprisonment. *Ib.*

419

Upon such a finding the person so imprisoned is entitled, under art. 1, sec. 8 of the constitution of Ohio, to the writ of *habeas corpus*. *Mullaney, Ex parte.*

419

The probate court, in such cases, has jurisdiction to entertain application for and to issue the writ of *habeas corpus*. *Ib.*

The judgment upon one application for a writ of *habeas corpus*, refusing to discharge the prisoner, is not a bar to another or successive applications based upon the same facts. *Ib.*

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INJUNCTION—

Injunction will only lie against that which has already been done, not against what may be done. *Aydelote v. Cincinnati.*

710

Injunction does not lie against the discretionary power of a city council to construct or regulate the construction of street railways. *Ib.*

On a motion to dissolve a preliminary injunction on the ground that the allegations of the petition are untrue, the burden is on defendants to prove that fact, but such full and positive proof is not requisite as would be necessary upon a final hearing of the case. *Kuhn v. Woolson Spice Co.*

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Where a substantial legal right has been invaded, the court, in considering whether an injunction

Injunction—Insurance.

should issue, will not balance inconveniences, as to smallness of the damage on one side, or the magnitude on the other. This question is not, in such cases, a matter of special weight, and an injunction will issue regardless of consequences. *Shaw v. Forging Co.* 107

See also OFFICES AND OFFICERS; REPLEVIN; TELEGRAPH AND TELEPHONE COMPANIES.

INSOLVENCY—

A mortgagee, in whose mortgage there is an exception of property conveyed as above stated, is not estopped by such exception from asserting his lien as prior to that of the deed of settlement referred to and held invalid. *Case v. Hewitt.* 365

A deed of trust for the payment of creditors named, the balance, if any, of the proceeds of the sale, of the property to go to grantee, operates, under Ohio laws, as an assignment for the benefit of all creditors *pro rata.* Ib.

A deed of settlement by a husband to his wife, without other consideration than love and affection, should be set aside where it appears that the husband, engaged in mercantile business, was, at the time of making such deed, owing numerous creditors, and did not reserve sufficient property to pay his debts. Ib.

The intention of a purchaser not to pay for goods may be presumed when he has knowledge of his own insolvency and inability to pay for them; and such intention may be inferred from the mere fact that the purchaser had undisclosed knowledge of his gross insolvency, but such inference may be rebutted. *Henderson v. Belford.* 640

A deed of assignment for creditors is not subject to internal revenue tax, as such a transfer is in no sense a sale, merely conveying to a trustee the title to the property to be administered under the direction of the court. *Mills, In re.* 315

Section 6343, Rev. Stat., as amended 39 O. L., 290 and 291 is constitutional. *Summers, In re.* 301

A chattel mortgage given by an insolvent person to a bank to secure a certain sum of money, within ninety days before making an as-

signment for creditors, a part of which sum was an old debt owed by the insolvent to the bank, and a part was for money advanced by the bank to the insolvent at the time of the giving of the mortgage, is void as to the pre-existing indebtedness and valid as to the money so advanced.

Ib.

Section 6344, Rev. Stat., as amended 39 O. L., 290 and 291, providing that any creditor as to whom any of the acts in sec. 6343 are void may commence an action to have such acts declared void, and any assignee shall bring suit to recover all property so sold, conveyed, mortgaged or assigned, or in case of his failure to commence such suit, upon notice to do so, by a creditor, such creditor may himself commence such suit, is constitutional. Ib.

Ib.

A preference given by an insolvent debtor to a creditor within four months of the filing of a petition in bankruptcy can not be avoided, unless it appear that at the time of receiving the preference the creditor had knowledge of some fact or facts calculated to produce in the mind of an ordinary intelligent man a belief that the debtor was insolvent. *Taft v. Bank.* 405

Constructive notice is sufficient ground for such a belief; but the circumstances upon which notice is predicated must be of a character to induce belief as distinguished from suspicion. Ib.

See also CORPORATIONS.

INSURANCE—FIRE—

A party insured in a mutual fire association organized under secs. 3686, *et seq.*, Rev. Stat., becomes a member by signing the constitution and by-laws and is bound to know what its rules and regulations are while in old line or stock companies a policy holder is charged with notice of only such as are brought to his notice in the application or policy. *Crandall v. Insurance Assn.* 711

No recovery for a loss can be had on a fire insurance policy issued to a member of a mutual insurance company organized under secs. 3686 to 3690, Rev. Stat., where he has "refused or neglected" to pay the "necessary assessments" thereon within the time limited by its laws, unless the condition as to the time of payment thereof has been waived or the

Insurance.

INSURANCE—Continued.

time extended by the officers of the association. Ib.

Unless rebutted by proof to the contrary an assessment levied at a meeting of the board of directors and officers of a mutual insurance company for payment of losses and incidentals, will be presumed to be "necessary," within the meaning of that term as used in the policy or by-laws. Ib.

Where a member of such an association received notice from the secretary of the company directing him to pay the assessment levied to the collector, naming him, when he should call at his (assured's) house, the expiration of that time while waiting for the collector to call would not avoid the policy. Ib.

And where the collector called, and informed assured that he would not be required to pay the assessment at once, if assured had reason, knowing the rules of the company, to believe that the collector had authority to extend the time, his failure to pay as first described would not avoid the policy. Ib.

A letter from an insurance company to assured, upon receipt of notice of loss, demanding a compliance with the conditions of the policy in regard to notice of loss, the amount, etc., and reciting that "in case differences shall arise" touching such loss, the matter shall be submitted to appraisers, does not amount to a demand for appraisalment. *Dun & Co. v. Insurance Co.* 667

The damages fixed by appraisers and returned in their award are conclusive and cannot be opened up upon submission to a jury in an action for loss upon a fire policy. Ib.

An insurance company is entitled to the sixty days limitation on bringing suits for loss upon a policy of insurance, to investigate the claim, and waiver of proof of loss does not make the claim due at once unless the company notifies assured that it will not pay in any event. Ib.

If an insured brings suit within sixty days of presenting notice and proofs of loss he must fail unless the company deny liability on the policy, when an action may be commenced without waiting such time. Ib.

Where an insurance company sent its adjuster to the place of loss

to investigate it, and he assisted in selecting two appraisers to estimate the loss, and the appraisers made a report thereof, and the adjuster and assured agreed as to the loss on other property under the policy, may be considered in determining whether or not proofs of loss were waived. Ib.

An adjuster, employed by an insurance company to act for it in settling a loss, is the agent of the company and all that he does within the scope and line of his employment and duties binds the company. Ib.

The requirement of preliminary proofs of loss is a formal condition, inserted in the policy of insurance solely for the benefit of the insurer, and it may waive such proofs in whole or in part, either by direct action of the insurer, or his general agent by virtue of his authority and such waiver may be express or implied. Ib.

An insurance company must not, by its acts or the acts of its authorized agents, within the scope of their duties and authority, do anything to throw the insured off of his guard, and cause him to believe, as any reasonable man under similar circumstances would believe, that proofs of loss are not wanted by the company or they will be held to have waived such proofs. Ib.

In an action by a partnership to recover insurance the burden is on the plaintiff to prove, that it is a partnership doing business in Ohio; that at the time of the loss and also when the policy was given the property belonged to the partnership; that the same was injured or destroyed by fire as claimed, and the amount of loss or injury; that plaintiff performed all the conditions of said policy, or that the defendant waived such as were not performed by plaintiff sixty days before bringing suit. Ib.

If an insurance company, by its adjuster, proceeds to investigate a loss on its merits, and by what it does causes the insured to believe, and a man of ordinary judgment under the circumstances would have so believed, that it was only the amount of loss in dispute, and nothing else, that will amount to a waiver of proofs of loss. Ib.

Mere silence on the part of an insurance company, or sending agents to make inquiry or investigation

Insurance—Interpleader.

into the matter of the loss, or an attempt to compromise, do not amount to a waiver of proofs of loss. Ib.

A denial of all liability, on the ground that the loss is not within the policy, or that the policy is void, is a waiver of the clause requiring proofs of loss. Ib.

An insurance company cannot recall, or reclaim a waiver of proofs of loss and demand or insist upon such proofs. Ib.

A notice of loss under a policy of insurance immediately after a fire, or as soon as it can be done with reasonable diligence, to the agent of the company at the place where the fire occurred, or with such diligence causing notice of the loss to be brought to the knowledge of the company, is a sufficient compliance with the condition requiring notice of loss to be given to the company. Ib.

INSURANCE—LIFE—

In an action against a life insurance company, under a policy which had lapsed and had been reinstated upon health certificates by assured, which were claimed to be false by the insurance company, an interrogatory as to whether assured "had any illness affecting his health between the times when he was examined by the physician of the defendant association for admission to membership therein and the time he signed * * * health certificates," without including a definition of "sound health," which, under the facts stated in preceding paragraphs, was an important question, is objectionable and was properly refused; and the same rule is applicable to an interrogatory regarding ailments. Ohio Mut. Life Assn. v. Draddy. 591

It is the policy of the law to construe health certificates made to life insurance companies for reinstatement under lapsed policies, favorably to the assured, and where there is any doubt as to the proper construction that doubt should be resolved in favor of the applicant. Ib.

Where assured, in making such certificates, certified that "I have not now, and have not since said examination, any illness or injury, nor any medical treatment, or any ailment affecting my health, so far as I know," to render such certificate false by reason of a failure to set forth illness, injury, or medical at-

tendance, it must appear that assured, when he signed the certificate knew that such injury, illness or ailment affected his sound health, or that the medical attendance was with respect to any injury, illness or ailment affecting his sound health. Ib.

A failure, in making such certificates, to set forth the fact that assured had suffered from a stomach disorder, of a more or less serious nature, does not avoid the policy where the evidence fails to show that assured was told by any of his physicians that the malady was serious, or that he knew he was being treated for serious trouble, and it appears that he was not confined to his bed, but was able to pursue his ordinary vocations. Ib.

An assured, in making health certificates for reinstatement under a lapsed policy of life insurance, not required to set forth an illness or injury, a mere indisposition, for instance, which did not affect his sound health, as above defined; and the same rule is applicable to statements regarding medical attendance, which, in order to be required to be set forth, must have been with respect to an illness, injury or ailment affecting sound health. Ib.

In life insurance "sound health" means that state of health which is free from disease or ailment that seriously affects the general healthfulness of the system; not a mere indisposition. Ib.

INSURANCE POLICY—

See PLEADING.

INTEREST—

Interest upon interest, or compounding interest, as a general rule, is against the policy of the law. But interest may be allowed upon interest, as where there is a settlement of accounts between the parties after interest has become due, or there has been an agreement for that purpose after the execution of the original contract, or upon agreed rests. Goodhart v. Rastert. 40

INTERPLEADER—

The true province of a bill of interpleader under the equity practice, is to set forth substantially the general nature of the claims asserted by two parties on which each

Interpleader—Judgments.

INTERPLEADER—Continued.

seeks to recover from the defendant on the same debt or obligation. Connecticut Mut. Life Ins. v. Lea. 39

When such conflicting claims have been presented it is the duty of the plaintiff, in asking for an interpleader, to set forth generally in his petition the nature of the claims that have been made to him, so that the court can determine from the petition itself if an interpleader is proper. Ib.

The true foundation for such a bill is that two parties have presented to the plaintiff claims for the same debt or obligations, which claims are antagonistic to each other, and that the plaintiff is unable to determine which claim, as a matter of fact, is, and which is not well founded. And unless such claims have actually been presented, the plaintiff has no right to ask the parties to interplead. Ib.

It is not the duty of the plaintiff in such case to determine for himself which claim is sustained in fact, but if either claim is not well found in law there is no right to an interpleader. Thus if the plaintiff has become obligated to either party by an independent undertaking so that he does not stand perfectly indifferent between them, he cannot maintain an interpleader. Ib.

A petition in a suit by a bank as assignee of contractors to recover money due from a municipal corporation, in which the corporation has filed an affidavit for interpleader, is not subject to demurrer by one of the impleaded defendants, holder of a mechanic's lien, on the ground that such petition does not state a cause of action against him. Such suit, being originally a simple action at law, was, by the action of the city in demanding interpleader, converted into an equitable action wherein all parties are actors and all parties defendants, seeking rights in a common fund. Bank v. Cincinnati. 545

Where, in such a case, there is nothing in the petition which shows any claim against defendant to the fund in controversy, the court, on his demurrer, has nothing to pass upon, but must overrule the demurrer and leave the question to be settled upon future pleadings and the evidence. Ib.

The proper way to set up the fact that the subject of plaintiff's ac-

tion is not claimed by one who has been made a defendant by interpleader, is by answer, disclaimer or failure to plead at all, not by motion to set aside or modify the order of interpleader. Such order may be made by the court on the affidavit of the principal debtor and it is not for any alleged claimant to question that order. Ib.

The subject of an action is not necessarily the specific amount sought to be recovered by the plaintiff; it is the amount due on the contract itself. Therefore, where there are conflicting claims to the whole amount due, which render it unsafe for the party liable to determine whom to pay, he may avail himself of the statute of interpleader, even though plaintiff claims only a part of the amount due under the contract involved. Ib.

The costs of interpleader, brought by the company for whom the building was being erected, to determine to whom a balance due should be paid, the money being claimed by the contractor and the corrugating iron company, should, under the facts stated, be borne by the corrugating iron company. Block-Pollak Iron Co. v. Iron Co. 51

INTERROGATORIES—

In addressing interrogatories to a defendant corporation it is not necessary to designate by what officer of the company they shall be answered. Carter v. Enquirer Co. 119

Interrogatories attached to a pleading are required to be answered and verified by the party to whom they are propounded. They cannot be answered by his attorney. Wentzel v. Zinn. 97

JOINDER OF CAUSES—

It is proper to unite legal and equitable causes of action, or one sounding in tort and another in contract, if included in the same transaction, and connected with the same subject matter. Murphy v. Cincinnati. 541

JUDGMENTS—

A judgment for money cannot be taken against an unincorporated church as such. Males v. Murray. 373

Judgments—Landlord and Tenant.

A decree which merely finds that plaintiffs have a valid claim against an incorporated church congregation, without sentence of judgment that they shall recover, does not constitute a judgment and is not a sufficient basis for a proceeding in aid of execution under sec. 5464, Rev. Stat. Ib.

The fact that an agreement is offered to the sheriff by the assignee that in consideration of the delivery of such goods to him to be sold, the lien of the judgment shall attach to the proceeds as to the original goods, and the proceeds be applied on the execution, and that such goods are of greater value than the amount due on the execution, and can be sold to better advantage by the assignee, is not sufficient for joining the judgment creditor and sheriff from selling the goods. Mack v. Steinau. 701

A judgment recovered before a justice of the peace for balance due on a purported chattel mortgage covering goods the title to which it is claimed by the vendee remained in the vendor, is *res adjudicata* in a subsequent suit to enjoin the sale of the goods upon execution. Cavanaugh v. Bloom. 222

Where justice will be promoted thereby, a case will be sent back for retrial on account of an error that is purely technical. Thus, where a petition blended in one count two cases of action, one at law and one in equity, against different defendants, a judgment in favor of both defendants, on demurrer to such petition, should be reversed. Hare v. Brahm. 583

JURISDICTION—

See COURTS.

JURY—

Both parties are entitled to the independent and best judgment of each juror, therefore it is the duty of a juror not to yield a well grounded conviction because it does not accord with the convictions of his fellow jurors. Dussel v. Street Rd. Co. 631

Experience shows that the candid, impartial judgment of ten or eleven intelligent men is a safer guide than of one or two equally candid, intelligent and impartial men. Therefore, while one or more

men may be right in their convictions, it is safer for them to consider well the sources of their convictions before they finally decide against an agreement. Ib.

A disagreement should not be had when an agreement can be reasonably secured by an impartial, candid and fair concurrence of the individual judgment of each juror. Ib.

A jury in an action for personal injuries may well remember that if they disagree that the contention must be settled finally by a jury of twelve men no better qualified to try the issues of fact and upon no better presentation of the case. Ib.

The object of a view by the jury of the premises in dispute is for the purpose of affording them a better understanding, appreciation and application of the testimony submitted at the trial, and not, for the purpose of gathering facts therefrom upon which to make up their judgment. Gilchrist v. Weil. 687

JURY—MISCONDUCT OF—

See NEW TRIAL.

JUSTICES OF THE PEACE—

Section 591, Rev. Stat., providing that Justices of the peace shall not have jurisdiction of any action in which the title to real estate is sought to be recovered, extends to actions in which title is involved in the construction of a will, and to determine which the justice would be required to exercise equity jurisdiction. Schaupp v. Jones. 597

LABOR ORGANIZATIONS—

See CONSTITUTIONAL LAW.

LANDLORD AND TENANT—

If the results of a fire were such as to render a whole building leased untenantable, it would make no difference where the fire occurred to take advantage of sec. 4113, Rev. Stat., but if it rendered only a small part of the premises untenantable, and the remainder of the premises were not affected so as to render it impracticable to prosecute the business in the remaining premises, without serious or substantial interruption, it would not terminate the lease as a whole but would leave the lessees liable to pay a proportionate

Landlord and Tenant.

LANDLORD AND TENANT—Con.

part of the rent for the premises left in a rentable condition. Gilchrist v. Well. 687

To justify a lessee abandoning premises or insisting upon termination of a lease under sec. 4113, Rev. Stat., the injury must go to the extent of rendering the premises unfit for occupancy; that is, the injury must go so far toward total destruction as to be no longer suitable to be used for commercial purposes, or such as it was fairly and reasonably designed to accommodate in its original construction. Ib.

A covenant in a lease to deliver up premises in as good condition and repair as the same shall be put in by the lessor at the commencement of the term, the natural wear and decay excepted, is a covenant to make such repairs only as would ordinarily arise under their occupation, and does not include extraordinary conditions resulting from fire or the elements, and does not prevent application of sec. 4113, Rev. Stat. Ib.

Whether premises occupied under a lease containing a covenant to make the ordinary repairs resulting from occupation were without fault or negligence of the lessees destroyed or so injured by fire or the elements as to be unfit for occupancy, so as to relieve them from payment of rent, under sec. 4113, Rev. Stat., providing that lessees shall not be liable to pay rent under such circumstances, is a question to be determined by the jury and the burden is on the lessees to prove by a preponderance of proof the extent of injury or destruction. Ib.

A wetting of the walls, and floors, merely putting out a fire in the furnace by flooding the cellar, if it could be removed and effects overcome in a short time, or mere cessation or interruption to business for a day or two would not alone constitute such destruction or such injury, as would justify a lessee in terminating a lease under sec. 4113, Rev. Stat. Ib.

If the premises in question were so injured by fire, without the fault or negligence of the lessees, as to render them untenantable and unfit for occupancy, the lessees would have the right to terminate the lease notwithstanding the lessor offered to restore and repair them. Ib.

Notwithstanding the defendants had the right to sub-let premises occupied by them under a lease, they would not, by sub-letting, release themselves from the payment of rent under their own lease, and inquiry as to whether they were undertaking or seeking to lease other premises, get out of and relet the premises occupied by them and into others, before the former were injured by fire, was permissible only to test the credibility and character of the witnesses interrogated. Ib.

Under a lease, of a building to be used for operating heavy machinery, wherein it is provided that lessors shall keep the walls (which, when the lease was made and to the knowledge of both parties, were bolted together), in repair and it appears that, upon being notified and finding that the walls were insecure, lessees were ready and willing to repair them, even to the extent of rebuilding, but were prevented from carrying out plans, prepared by an architect, for doing so, by lessees, in the first instance, claiming that the plans were insufficient, and then prevented from making repairs by the city, such lessees are liable for the stipulated rent during the time they retained possession of the building, notwithstanding the fact that it was insecure and untenantable. Sibley v. Ross. 683

Where the lessors of a building under contract to repair its walls negligently or perversely refuse to perform the obligations of the contract, they not only can recover no rent but would be liable to the lessees for damages sustained by breach of the contract. Ib.

The grantee of a lessor who had previously granted an estate for years, takes the fee limited by such estate and the right of election to declare the lease forfeited if premises are occupied for gaming purposes, does not pass under the general terms of the lessor's deed. Such grantee cannot assert the forfeiture or maintain an action in forcible detainer to recover the premises. Ackerman v. Thompson. 361

The provisions of the statute above referred to do not amount to covenants running with the land; nor is the statute a limitation on the fee. It constitutes a condition attached to the estate for years and is

Landlord and Tenant—Libel and Slander.

a condition subsequent, not precedent. Ib.

Section 4276, Rev. Stat., providing that when premises are occupied for gaming or lottery purposes the lease or agreement in which they are held shall be absolutely void at the instance of lessor, is for the benefit of the lessor and lessee cannot render the lease void by using the premises for gaming purposes. Such lease is not void *ab initio*. Ib.

The right of election is personal to the lessor and not subject to alienation, especially in the absence of a covenant in the lease that conditions therein stipulated or annexed by law shall extend to the assigns of either party. Ib.

LIBLE AND SLANDER—

Words capable of a construction charging street railway company with failing to make returns according to agreement contained in its charter, and of keeping two sets of books, are libelous. Cincinnati St. Ry. v. Tribune Co. 725

In libel, the innuendo cannot add to, enlarge, or change the sense of the words used, which should have their proper and legitimate interpretation, taken in the light of the extrinsic facts averred. Ib.

That where the publication of libel matter was malicious and with an intention to injure, vindictive or punitive damages may be allowed. Kahn v. Cincinnati Times-Star. 599

Nominal damages may be presumed from the publication of libelous matter but the question of the amount thereof must be left to the sound discretion of the jury. Ib.

Where the plaintiff has suffered real and substantial injuries in his business and been otherwise injured in his business by reason of the publication of libelous matter, he is entitled to compensatory damages; but if he has not suffered any real or substantial injury, he is entitled to nominal damages only to vindicate his right. Ib.

In an action for libel by a clothing merchant, whose place of business was spoken of as a place where questionable methods were employed in selling, whose business consists in the sale of goods which he represented to be tailor-made, on spe-

cial orders, but rejected because of misfits, but which were in fact ready made clothing, the jury, if they find the publication libelous, may consider such fact in ascertaining what damages, if any, he sustained to his business. Ib.

In determining damages in libel the jury may consider the reputation of the plaintiff as to the particular business in which he was engaged as well as the character and methods thereof. Ib.

A man's known reputation in a business community where he is known and lives is the resultant of the opinion of all and not the individual opinion of any particular person or persons. Therefore, the jury cannot go into particular acts to decide the known reputation of a business man at the time of the publication of a libel. Ib.

The extent of an injury to one in his trade or business, or in his reputation in relation to such trade or business, must depend partly on the nature of the publication; and partly on the character of the extent of his business or trade. A man's reputation in business may be so good as to be firmly established in public confidence, so that it cannot well be injured; or it may be so bad as to be incapable of serious injury; or while good, yet not so firmly established in public esteem as to prevent injury resulting to it. Ib.

The presence of mitigating circumstances not making a complete defense to a libelous publication may be considered by the jury in their discretion to diminish their assessment of damages. Ib.

It is a presumption of law that anything stated in a publication which is derogatory to the business reputation and trade of the plaintiff is false, and that the person in publishing the same intended to cause whatever injury naturally would and did result from such publication. Ib.

Unless the article published was entirely true, the law implies malice and liability will attach and the plaintiff can recover damages. Ib.

The law presumes every man's reputation as a tradesman to be good until the contrary is made to appear, but such presumption may be rebutted by evidence. Ib.

Lible and Slander—Mayors.**LIBEL AND SLANDER—Continued.**

It is a good defense to an action for libel that if after its publication the plaintiff agreed with the defendant to accept the publication of an apology in full of his cause of action, and that such an apology was published, but a mere naked promise unsupported by a consideration, is not of itself sufficient to maintain such a defense. *Ib.*

The publication of defamatory matter, libelous of itself, is presumed to be malicious in law unless published in the performance of some legal or moral duty. *Ib.*

Everything printed or written which reflects on the character of another and is published without lawful justification or excuse, is a libel, whatever the intention may have been. *Ib.*

Any written words are defamatory which impute to another that he has been guilty of any crime, fraud, dishonesty, immorality, vice, or dishonorable conduct, or has been accused or suspected of any such misconduct, or which suggests that the person is suffering from an infectious disorder, or which has a tendency to injure him in his office, profession, calling or trade. *Ib.*

See also ARREST.

LIMITATION OF ACTIONS—

A cause of action arising from undue influence over a weak mind does not accrue, within the meaning of the statute of limitations, until after the removal of the influence. *Edwards v. Daller.* 508

The statute fixes the limitation in which a suit to rescind a sale must be brought, which is arbitrary and without variation, while equity determines the length of time which constitutes fatal laches, according to the circumstances of each particular case. There is no relationship between the two. *Corrigan v. Rockefeller.* 494

MASTER AND SERVANT—

The test of liability of a master for the acts of his servants, is whether the injury complained of was committed by the authority of the master, expressly conferred or fairly implied from the nature of the employment and the duties incident to it. *Harbison v. Iliff.* 58

Where a master has a duty to perform and intrusts it to a servant, who disregards it to the injury of another, it is immaterial, so far as the liability of the master is concerned, with what motive or for what purpose the servant neglects the duty. *Ib.*

A principal is bound to concede that an agent is acting for him whenever a reasonably prudent man, under like circumstances with the third party caused to act affirmatively or negatively, would conclude that the agent was so acting, provided the appearance of things upon which such third person acts has a causal relation to the injury. *Ib.*

A larceny of the servant not authorized or ratified by the master, immediately following an unwarranted trespass, which trespass was directed and authorized by the master, such larceny having been committed not as a means or for the purpose of performing the master's work or connected with the trespass, is not within the scope of his authority, and does not make the master liable. *Ib.*

A master is liable to third persons for the frauds, torts, negligence and misdeeds of the servant in the course of his employment, though wilful and malicious, and although the master did not authorize or know of such acts and even forbade or disapproved them; but when the act is not within the scope of his employment, or expressly or impliedly in obedience to the master's orders, it is an act of the servant and not of the master, and the servant alone is responsible therefor. *Ib.*

Where the servant has authority to commit an act of violence under certain contingencies, the master is liable for the consequences of such an act when committed by the servant under the belief that such a contingency had occurred, or where he uses unnecessary violence, or does it in a manner which makes its consequences unnecessarily injurious, no matter how wilful, malicious and unauthorized the acts may be, or even though he desires to injure his master. *Ib.*

See also NEGLIGENCE.

MAYORS—

The mayor of a municipal corporation has no authority to take a bond and release the defendant from

Mayors—Municipal Corporations.

custody after conviction and sentence, except upon the order of the court of common pleas or a judge thereof, on granting the defendant leave to file a petition in error in said court. Cincinnati v. Board.

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MECHANICS' LIENS—

Section 16 of the Mechanics' Lien Law of 1877, 74 O. L., 668, now sec. 3203, Rev. Stat., includes all assignments of whatever character and whenever made. Bank v. Cincinnati.

545

Under the foregoing rules the liens for material furnished contractors with a municipal corporation in the construction of a sewer are not defeated or postponed by an assignment by the contractors of their claims against the city to a bank, to secure advances to carry on the work, although such assignment was made prior to the time when the liens were acquired. Ib.

The words "who has furnished," as used in said section, are not intended to designate or fix qualifications of time with reference to the assignments that are governed by the act, but are intended as *descriptio personarum*. Ib.

The delivery contemplated by the Mechanics' Lien Law, is a delivery which vests in the head contractor the title or ownership of the materials for which a lien or claim to priority is sought. Ib.

A party who, in good faith, furnished 1,849,000 brick under an estimate that 1,900,000 would be required for a certain sewer improvement, the brick being delivered on the cars and hauled by the contractor to where they were needed for the work, is entitled to a lien for the full amount of his claim, although 55,000 of the brick, after they had passed out of his possession, were diverted and used in another improvement; and although, under the circumstances stated, he knew that the bricks were so used and made no objection. Ib.

The delivery of brick along the line of a proposed improvement, where the time in which it was to be completed was uncertain and the quantity of brick to be used could not be determined in advance, and where the brick were received subject to approval by the city engineer, amounts to a simple tender of the

material and the delivery, from which the statute will run against the lien of the material man, is not complete until the material is accepted by the city engineer. Ib.

MORTGAGES—

An action to foreclose a mortgage given to secure a promissory note is not triable by jury. Brigel v. Creed.

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But one satisfaction of the debt can be had and any attempt upon the part of plaintiff to impose upon the defendant by securing a double satisfaction would be prevented by a court by proper proceedings. Ib.

Before the decree in the foreclosure suit was entered the same plaintiff brought another action on his note in which he sought a personal judgment against the defendants. The same defenses were set up in the second action as in the first. Upon the trial of that case, in order to prove the indebtedness of the defendants to him, the plaintiff introduced the record in the other case, in which appears the finding of the amount due on the note. The court allowed the introduction of the record and held it to be conclusive on the question of the amount due. Ib.

In an action to foreclose the decree may contain a provision that if the proceeds of sale shall not be sufficient to pay the costs and the indebtedness, the plaintiff shall have an execution for the deficiency. Ib.

MUNICIPAL CORPORATIONS—

An ordinance, granting a franchise to operate a natural gas plant, where the terms of eight members of the council expired before it was finally passed and the terms of fifteen other members expired before it could take effect by publication, is void under sec. 1691, Rev. Stat., whereby a council is prohibited from entering into a contract which is not to go into full operation during the term for which all members were elected. Kerlin Bros. Co. v. Toledo.

509

Bids for a natural gas plant, owned by a municipal corporation, indivisible parts of one transaction; contract of sale not completed until the passage of the franchise and gas rate ordinances; and where the contract was not so completed during

Municipal Corporations.

MUNICIPAL CORPORATIONS—Con.

the term for which all members of the council were elected, all proceedings relative to a sale void. Ib.

Where the bidders included in their bid the granting of an ordinance fixing satisfactorily to themselves the price they should charge for gas, and such ordinance was not mentioned in the advertisement for bids, there was no competition as to that ordinance and it was not competent for the council to enter into a contract based on such a bid. Ib.

Where a natural gas plant owned by a municipal corporation is offered for sale, which must be made under sec. 2673a, Rev. Stat., some action of the council, by order, resolution or ordinance, indicating an intention to offer the plant for sale, is necessary, inasmuch as, by express terms of the statute cited, the offer can be made only upon vote of three-fifths of the members of the council. Ib.

A resolution directing the city clerk to advertise for bids for a natural gas plant, is a resolution of both a general and a permanent nature, within the meaning of sec. 1694, Rev. Stat. Ib.

Where part of a natural gas plant consists of real estate, and the council offers it for sale as an entirety, in order to make a valid contract, it is necessary to proceed under sec. 2673a, Rev. Stat., requiring advertisement for bids; and in order to secure free and fair competition the bids should respond to the advertisement. Ib.

Under the governmental act for the city of Columbus, an ordinance which had been read on two separate days before the regular election for councilmen, may, after the annual organization of the council following said election, be read a third time and passed. The unfinished business of the old council does not die with the expiration of the terms of the old members, although under the law in question, the terms of all members, save where by operation of law a successor is not elected and qualified, expire at the same time and an entirely new membership is elected. Smith v. Railway Co. 441

A vote on the passage of an ordinance of a general or permanent nature without having such ordi-

nance read on three different days, or such reading properly dispensed with, is a vain and useless act, and, whether favorable or unfavorable to the ordinance, is a nullity. Ib.

Advertising for bids is not a misapplication of corporate funds, where individuals have subscribed a sufficient sum to meet the expense thereof, and the sum is subject to the order of proper officials. Aydelote v. Cincinnati. 710

The provisions of sec. 2473, Rev. Stat., requiring the owners of two-thirds of the ground of a square to petition for an ordinance blocking such square against the erection of wooden buildings, are jurisdictional and without such a petition the council has no right to act. Bedford v. Tarbell. 337

A widow owning a dower interest in such a square, is an owner within the meaning of the statute to the extent of such interest and may petition therefor; but such widow has no right to sign for the remainder of the property. Ib.

Section 2473, Rev. Stat., permitting municipal councils, upon proper petition, to pass ordinances prohibiting the erection of wooden buildings whose outer walls are not of iron, stone, brick, cement or mortar, or some of them, does not authorize an ordinance prohibiting the erection of "any wooden building" and an ordinance to that effect is void. Ib.

A property owner is not estopped from contesting the validity of such ordinance, on any ground, by having signed and filed the petition therefor. Ib.

An injunction granted on a petition by a municipality to prevent defendant from completing a wooden building within a square blocked by an ordinance against the erection of wooden buildings, which ordinance was held to be invalid and the injunction to have been wrongfully granted, was ancillary and only the expenses incurred by the injunction itself, not the expenses in contesting the suit, can be allowed in a suit on the bond. Tarbell v. Ennis. 346

A municipality has no power to make the violation of such an ordinance criminal or to make the ordinance penal in its nature. Such power, if it exists, must be delegated in specific terms. Cline v. Springfield. 389

Municipal Corporations—Negligence.

The fact that no other city ever required such information of gas companies is not material, where the fact of the power resides in a municipal corporation. Ib.

A municipal corporation, having authority to regulate the price of gas, has, as incidental thereto, power to require gas companies to furnish annually such information and data, exclusively in their possession, as will enable the council to act intelligently in fixing a price for gas which will be reasonable and just to the public and to the gas company. Ib.

The term "any gas company," when used in such an ordinance, is general and comprehends natural as well as artificial gas companies, although, at the time of the passage of the ordinance, the use of natural gas was unknown. Ib.

The mere fact that city officials effected a saving to the city by the adoption of a certain method of contracting, would not make an act valid which the law declares is invalid or authorize payment under the ordinance in question. Scio (Vil.) v. Hollis. 99

Under an appropriating ordinance, in a city of the first grade, first class, containing the following item: "For Main Pipe Extension: Salaries and wages \$5,000; material and supplies, \$9,200." the work of laying main pipe could not be done by one who undertakes to do a certain amount of work for a fixed sum, over which work the city authorities would have no power except to see that the terms of the contract were complied with, because money so paid is neither "salary" nor "wages." Ib.

Nor could the material and supplies be paid for under the ordinance in question, inasmuch as they are not bought by the city by direct and independent contract, but are included in and to be paid for with the completed job. Ib.

See also REAL PROPERTY; WITNESSES.

NATURAL GAS TRUSTEES—

See OFFICES AND OFFICERS.

NEGLIGENCE—

The law requires the utmost care and skill which prudent men are accustomed to use under similar circumstances, but the rule is not to

be pressed to an extent which would make the conduct of a business so expensive, as to be wholly impracticable. Dussel v. Street Rd. Co. 631

In an action for personal injuries caused by the negligence of defendant, it is not necessary for plaintiff to allege that the injury was caused without negligence on her part, but having as pleaded, and issues having been taken thereon, the defendant is entitled to the benefit of the defense of contributory negligence, the same as if affirmatively alleged in the answer. Ib.

"Proximate cause" is a cause from which a man of ordinary experience and sagacity would foresee that the result would follow, that the injury was of such a character as might reasonably have been foreseen or expected as the natural and ordinary result of the negligence complained of. Ib.

There is no absolute rule requiring one driving along a street upon which are the double tracks of a street railroad, to either stop, look or listen before crossing such tracks, or to look back one or more times before going upon the tracks, to ascertain whether or not there is a car operated by electricity coming from behind, in such a manner as to probably or inevitably bring about a collision. The question whether or not the conduct of a party in driving upon the tracks of a street railroad constitutes negligence should, in each case, be submitted to the jury. Lewis v. Street Railway. 53

It is not negligence *per se* to ride upon the platform of a railroad car: and where a passenger in a crowded railway car surrendered his seat to a lady and went out upon the platform, intending to go into another car, and it is alleged that the other cars were also crowded, and it is also alleged that plaintiff could not get back into the car which he had left on account of its crowded condition, it cannot be said that he was negligent in remaining on the platform. Shrum v. Railway Co. 244

Where a petition alleges that a car was so overcrowded that the plaintiff was obliged to ride upon the platform, and that the train broke in two, and the passengers inside the car rushed out and crowded the plaintiff off of the car, causing him

Negligence—New Trial.

NEGLIGENCE—Continued.

injury, the overcrowding of the car was not the direct and proximate cause, of the accident. In such case the breaking of the train was the proximate cause, and if it resulted through the company's negligence it is liable, but unless the petition alleges the breaking of the car as the negligent act it is subject to demur-
rer. Ib.

The fact that an employee in a factory, after being caught in a cylinder, did not use the devices for his safety, in the form of a rope or lever which would have stopped the cylinder, would not be such negligence as would prevent recovery, providing the defendant was guilty of negligence. Connors v. Golding. 614

To recover in an action against the owners of a factory for personal injuries caused by the negligence of an employee, it is necessary to prove that he was the representative of the defendant for the time being at least and that he had authority to direct and control the plaintiff, but it is immaterial by what manner he was commissioned with such authority, whether by express direction or not. Ib.

The burden is on the plaintiff to show that the injury was caused by the negligence complained of, without regard to whether the defendant was negligent in other respects. Ib.

A railroad conductor, in the discharge of no duty connected with his employment, riding on a pass upon another train than his own, from the point of destination of his train to his place of residence, with the consent, permission and knowledge of the conductor of the other train, is not a fellow servant of such conductor; and the negligence of the latter will not defeat a recovery by the former for injuries caused by the negligence of the conductor in control of such train. Bycraft v. Railway Co. 652

See also RAILROADS.

NEW TRIAL—

An error in overruling a motion for a new trial, which the court declines to grant unless applicant will give bond, is waived by subsequently giving the bond and obtaining the new trial. American Exchange Bank v. Brenzinger. 208

A party who voluntarily, without fraud or mistake, gives a bond required as a condition to a new trial, granted in furtherance of justice and to which applicant was not legally entitled, and who receives the benefit of a new trial, is estopped from denying liability under the bond. Ib.

The granting of a new trial, under circumstances stated, where no legal right thereto existed in favor of the applicant, constitutes a sufficient consideration for the bond required. Ib.

It is not the duty of the court in all cases to either absolutely grant or overrule the motion for a new trial. Cases frequently arise where the motion for a new trial is addressed to the discretion of the court and in such cases, if a new trial is granted, it may be granted upon condition. Ib.

Where the applicant for a new trial, through the inadvertence or misapprehension of his attorney, failed to offer material evidence upon the first trial and voluntarily, without fraud or mistake, gives a bond to pay any judgment rendered against him in a new trial, which is granted upon the giving of the bond, not because applicant was entitled thereto, but solely in furtherance of justice, such bond, unless prohibited by statute, constitutes a valid common law obligation. Ib.

Juror listening to the conversation of an interested party addressed to some third person, which may have been prejudicial to a party to the case, sufficient cause to warrant the court in granting a new trial, even though it is not shown, as a matter of fact, to have influenced the verdict. Briggs v. Rowley. 177

A petition for a new trial filed under sec. 5309, Rev. Stat., must set out the issues upon the former trial and the evidence given thereon, together with the newly discovered evidence; setting forth merely the newly discovered evidenc is not sufficient. Ib.

If the character of newly discovered evidence merely tends to impeach that of a witness upon a former trial, it is not newly discovered evidence within the meaning of the term, as used in sec. 5309, Rev. Stat., and will not avail as a ground for a new trial. Ib.

New Trial—Offices and Officers.

An affidavit in support of a motion for a new trial on the ground that certain jurors were disqualified, must show that neither the party making the affidavit nor his counsel knew of the disqualification complained of. Thus, an affidavit by the party complaining and one of his attorneys, where three were employed in his behalf on the trial, is not sufficient. *Clerke v. Tribune Co.* 176

NOTICE—JUDICIAL

See PLEADING.

NUISANCE

The rule with regard to all nuisances is, that the injury occasioned thereby must be real and substantial, and such as impairs the ordinary enjoyment, physically, of the property within its sphere. Thus, where the effect of vibrations, caused by the use of drop hammers in a factory, when it reaches residences in the neighborhood, is so slight as to be almost imperceptible, no action lies therefor. *Shaw v. Forging Co.* 107

In deciding whether noises constitute a nuisance, the test is whether the noise is of such a character as would be likely to be physically annoying to a person of ordinary sensibilities, or whether the trade out of which such noise arises, is carried on at such unreasonable hours as to disturb the repose of persons dwelling within its sphere; and regard must also be had to the quality as well as to the quantity of the noise. Ib.

The operation of drop-hammers in a factory in a residence neighborhood results in a degree and kind of noise that would be productive of actual physical discomfort and annoyance to a person of ordinary sensibilities. Ib.

There is a time for work and a time for rest and where one seeks to work all the time, to the discomfort and disquietude of his neighbor and to a deprivation of the natural rest to which the neighbor is entitled, as by the operation of a factory, in a residence district, both night and day, there is a material interference with the neighbor's rights, for which he is entitled to a remedy. Ib.

Where a nuisance is sought to be enjoined, and the injury com-

plained of is the destruction of the comfortable use and enjoyment of plaintiff's homes, by reason of noises resulting from the operation of machinery by defendant, it is not necessary that the plaintiff, before applying for equitable relief, should establish his right by an action at law. Ib.

In an action to enjoin a nuisance, the defendant cannot avail itself of the fact that the plaintiff located in the vicinity subsequent to the establishment and operation of defendant's plant, when it appears that the nuisance complained of is caused by increased noises caused by a change of methods in operating the plant and made subsequent to plaintiff's location. Ib.

An injunction restraining a nuisance should be withheld for a reasonable time to give the defendant an opportunity to abate the nuisance if he so desires. Ib.

OFFICES AND OFFICERS

Public officers, as such, have no right to bring suits in their own names, unless authorized to do so by statute; and as the statute nowhere gives natural gas trustees such authority, they have no power to bring suit to enjoin the sale of a natural gas plant belonging to the corporation. *Kerlin Bros. Co. v. Toledo.* 509

While public officers may be designated as trustees, or directors, or agents, they are not in any sense trustees of an express trust. Natural gas trustees, therefore, have no authority, by virtue of sec. 4995, Rev. Stat., providing that the trustee of an express trust may bring an action without joining the person for whose benefit the suit is prosecuted, to bring suit to enjoin the sale of a natural gas plant by the corporation. Ib.

Section 2966-3, Rev. Stat., providing for the appointment, qualification, etc., of deputy state supervisors, is not unconstitutional from a lack of uniformity in eliminating from its operation cities governed by other statutes. Under the authority of *State ex. rel. v. Buckley*, 60 Ohio St., 273, when a statute upon a subject of a general nature is made to extend to the whole state in one part thereof, and in another part an attempt is made to limit its operation to territory less than the state,

Offices and Officers—Partition.

OFFICES AND OFFICERS—Con.

the limitation may be disregarded; and such construction should be given, when reasonable, as will uphold the statute rather than one which would defeat it. *State v. Craig.* 577

Deputy state supervisors of elections, are not officers, within the legal definition of that term, and, though their jurisdiction may be co-terminalis with that of the county, they are not county officers or within sec. 1, art. 10, of the constitution, providing that the general assembly shall provide by law for the election of such township and county officers as may be necessary. Section 2966-3, Rev. Stat., is not, therefore, unconstitutional for the reason that it provides for appointment instead of election of deputy state supervisors of elections. Ib.

The provisions of sec. 20, art. 2, of the constitution, that the salary of a county official cannot be increased during his term of office, apply only to compensation for duties germane to his office or incidental or collateral thereto, and do not apply to services rendered in an independent employment to which he is appointed by an act of the state legislature. *State v. Lewis.* 537

Under the foregoing rules, a county surveyor who is required by law to perform the duties of a member of the county board of equalization, is entitled to compensation therefor, independent of and without regard to the compensation which he may receive as county surveyor. Ib.

The act of 94 O. L., 396, applies only to the elective county officers in their respective offices, and does not apply to additional, independent offices imposed upon them by the legislature. Ib.

PARENT AND CHILD—

An agreement entered into by a non-Catholic at the time of his marriage with a Roman Catholic, that the children born of such marriage shall be brought up in the Roman Catholic faith, or a similar agreement in respect to any religious denomination, in a controversy between the father and mother as to custody and education of such children, creates an estoppel of the father's right to direct the course of re-

ligious training so provided for, and he cannot be heard to say that the well-being of the children demands the violation of such agreement. *Luck, In re.* 1

But after such agreement has been annulled or disregarded by the father as surviving parent, having custody of the children, and for years, since the death of the mother, the nurture of the children has been away from such training, no such estoppel, upon the death of the father and in a contest between relatives of the father and mother, can be allowed to prevail over conditions which may materially affect the welfare of the children. Ib.

Under circumstances above stated, where it appears that the mother's relatives seeking guardianship of children of the ages (at date of application) of six and seven years, made no application therefor until more than four years after the mother's death, and that the children have grown into the affections of the father's relatives, with whom they have been allowed to remain, and no preponderating circumstances appear establishing that the best interests of the children will be subserved by a change, they should be allowed to remain with the father's relatives although under such guardianship their religious training will be in violation of the marriage agreement above referred to. Ib.

PARTIES—

See OFFICES AND OFFICERS; WRONGFUL DEATH.

PARTITION—

Partition may be had where the life tenant consents to a sale free of the life estate and it appears to the court that a sale will not be prejudicial to the interests of the remaindermen. *Helming v. Meyer.* 308

The limitation of sec. 5756, Rev. Stat., refers to the time of entering the decree, and not to the time of filing the petition. Therefore, upon application for partition within the time limit, and without compliance with the statute, the court may overrule a motion to dismiss the petition and grant an order overruling the motion for plaintiff in partition for judgment until the statutory period has elapsed, unless the latter prove.

Partition — Pleading.

and the burden is his, that all debts and claims have been paid or secured to be paid. Schneider v. Cordesman. 571

PARTNERSHIPS—

A partnership at will may be dissolved by agreement of partners, and it is immaterial whether it be done by an express agreement, or by acts and conduct of its members, or one of them, showing an intention, with acts carrying it into effect, to terminate the relation. Dun & Co. v. Insurance Co. 667

The fact that one member of a firm, organized for the purpose of carrying on a banking business, purchased in good faith, goods for the firm in consideration for and in satisfaction of a judgment held by the firm against the owner thereof, without consulting with the other member or getting his consent thereto, and kept the store, containing these goods as a stock, open as a going concern, and sold goods from time to time, will not operate, as a defense of dissolution of the firm. Ib.

The fact that one member of a firm went out of the state to live and gave no further personal attention to the firm business, but left it to the resident partner, does not in itself work a dissolution thereof. Ib.

An association of corporations under the name of the Golden Eagle Buggy Company, without incorporation or partnership contract, which does not show such a mutual agency, common ownership or profit sharing as is necessary to constitute a partnership. Merchant's Nat'l Bk. v. Wagon Co. 81

See also INSURANCE—FIRE.

PLEADING—

A party cannot allege want of knowledge of matters of record. These should be ascertained and definitely set out. Wentzel v. Zinn. 97

Material averments and entire causes of action can not be stricken out on motion. They must be met by demurser or answer. Ib.

A motion to make an allegation more definite and certain will not lie where such allegation, though in itself uncertain, is explained in a subsequent part of the pleading. Barron v. Plate Glass Co. 114

The object of the rule requiring certainty in pleadings is not in-

fringed where the matter in reference to which the pleading is said to be uncertain, is peculiarly within the knowledge of the opposing party. Ib.

Less certainty is required in setting out matters of inducement, than in setting out the gist of the action; therefore, a plaintiff will not be compelled to set forth the names of individuals, copartnerships, and corporations, organized as, a trust, under a certain name, for the purpose of "freezing" him out of a certain line of business. Ib.

The filing and determination of a demurrer to a pleading on the ground of insufficiency, is a waiver of the right to file a motion to strike out from such pleading or to make the same definite and certain. Montgomery v. Thomas. 290

A petition in an action on an injunction bond, alleging that a temporary restraining order was granted and a bond given; that plaintiff was restrained and prevented from completing his building for some time and that he was caused expense in procuring the restraining order to be dissolved and the petition in the original action to be dismissed, by a fair inference amounts to a sufficient allegation of the fact that the court decided that the injunction ought not to have been granted, although the better course would have been to have stated more directly the action of the court as to the restraining order. Tarbell v. Ennis. 346

The defendant in a suit upon a promissory note who pleads a want of consideration may be required, by motion to make more definite and certain, to set forth the specific facts upon which such defense is based. Eagle Ins. Co. v. Blymyer. 417

Section 5091, Rev. Stat., substituted an averment of performance, generally, for the specific averments of the common law, but in no way broadened the effect of such an averment. It is still limited to, and is to be read in connection with the conditions precedent, pleaded by plaintiff as part of the defendant's contract. Lauer v. Life Assurance Society. 397

At common law it was the rule that a performance of each condition precedent set forth as a part of the promise must be averred spe-

Pleading.

PLEADING—Continued.

cifically; but these averments of performance related and referred to, and were required of, those conditions alone which plaintiff averred as a part of the defendant's contract. Ib.

The time when the contract was made, if material, must be stated and laid truly; but if not material, any time antecedent to the bringing of the suit, within the statute of limitations, will suffice. The place of making the contract need not, as a general rule, be averred; place, however, may become material in a particular case, and the burden of pleading it, whether upon the plaintiff or defendant, will depend upon the circumstances of such case. Ib.

Plaintiff, in his petition, has the right to state his view or conception of the matter or contract, and if defendant does not agree with him, he then interposes his defense to sustain his own view or destroy plaintiff's. But the court cannot undertake, on mere motion, to make plaintiff plead a view of the contract not in harmony with defendant's notions, as the court cannot take judicial notice of what the contract really may be. Ib.

An insurance policy is a written instrument within the meaning of sec. 5085, Rev. Stat., above referred to, and when sued upon, a copy thereof should be attached to the petition; and if a copy of the application for insurance constitutes a part of the policy, it should also be attached; otherwise it is not required. Ib.

In declaring upon a contract the primary rule is that the promise, the obligation, of the defendant, must be fully, truly and accurately set forth; hence, if the promise or obligation be dependent upon conditions precedent, such conditions form an integral part of the promise or obligation of the defendant, and must be fully, truly and accurately pleaded. Ib.

A written instrument as evidence of indebtedness, under sec. 5085, Rev. Stat., comprises any instrument in writing which witnesses a promise, whether conditional or unconditional, on the part of the maker thereof, to pay a certain fixed, liquidated sum of money; when sued upon, a copy of such instru-

ment must be attached to the petition. Ib.

The court cannot take judicial notice of what the terms and conditions of the contract really are, save as disclosed by the petition; and in the first instance, when the question is presented by motion to make the petition more definite and certain, being in the nature of a special demurrer, the court must assume that the contract is as stated, without qualification. *Block v. Distilling Co.* 409

While it may not be material in the least to the controversy between the parties, yet for the court to get an intelligent understanding of the subject of the controversy, it is always proper that explanatory averments should be made by way of inducement of matters connected with the subject of the controversy that otherwise would be left vague and uncertain. Ib.

So much of the petition as is devoted to averment of performance of conditions precedent is not by way of explication of the contract, which must be independently set forth when the contract itself is stated, expressly or by way of necessary inference, but are averments which are to show that the conditions of the contract, as they are stated or described, when the contract is set forth, have been fully complied with and the obligation of the defendant fixed. Ib.

The question whether the plaintiff has stated the contract correctly, or incorporated all that is essential to his right to recover, cannot be met by motion or special demurrer; that is matter of substance, and is reached by tendering proper issue of fact. Ib.

In a suit on a written contract, an averment that "among other things it was agreed," the words "among other things," should be stricken out as surplusage. Ib.

While a plaintiff must state the contract sued on, at least so much thereof as embraces the defendant's promise, truly and correctly, yet it is sufficient to state those parts of it whereof a breach is complained, or, in other words, to show so much of the terms beneficial to the plaintiff as constitutes the point for the failure of which he sues. Ib.

Where a pleading contains inconsistent averments, as where a pe-

Pleading — Railroads.

tition contained such averments as to interest due, which, when taken in connection with the recital in general terms of a subsequent agreement, made it uncertain whether plaintiff counted on the agreement or a note, the pleader should be required to reform such pleading. Edwards v. Daller. 531

POLICE—

See ARREST.

POLICE COURTS—

An act of the general assembly extending jurisdiction of the police court to hear and finally determine all misdemeanors committed within the limits of the county in which the court is situate, which is not enacted by a two-thirds vote of the members of each house, is unconstitutional and void. State v. Voris. 451

An act of the general assembly giving jurisdiction to the police court to hear and finally determine misdemeanors committed within the limits of the county in which such court is situate, which excludes, in cases where imprisonment is a part of the penalty, from jury service, the citizens in that part of the county over which the jurisdiction is extended, is in contravention of the constitutional right of trial by jury of the county or district in which the offense is alleged to have been committed. Ib.

PRESCRIPTION—

In order to claim title by prescription, the use must be adverse, uninterrupted, continuous, and with the knowledge of the owner of the estate for a period of twenty-one years. Dayton v. Hydraulic Co. 192

PROBATE COURTS—

The jurisdiction of the probate court in the matter of removing executors and administrators, under secs. 524 and 6017, Rev. Stat., is exclusive, and its exercise can be reviewed only for fraud, or for palpable and manifest abuse of power, and upon complaint by a party whose substantial rights are affected thereby. Munger v. Jeffries. 12

The probate court is a court of record, competent to decide upon its own jurisdiction, and its records import absolute verity. Carter Cattle Co. v. McGillin. 146

See INSOLVENCY.

PUBLICATION—

Publication, when a daily paper is selected, once each week and on the same day, for three consecutive weeks, constitutes a compliance with sec. 2502, Rev. Stat., relating to public notice of ordinances granting rights to street railway companies. It is not necessary that the notice should appear on every secular day for three weeks. Smith v. Railway Co. 441

RAILROADS—

Section 3365, Rev. Stat., imposing upon railroad companies the duty of blocking guard-rails, except upon bridges, applies to trestles. Johns v. Railway Co. 348

If data are furnished by which the speed of a railroad train can be determined, the question whether the train was running at an unlawful rate of speed should go to the jury. If not, it is then a question of law for the court. Watson v. Railroad Co. 454

The mere fact that a railroad train was running at an unlawful rate of speed at a public crossing does not, of itself, constitute negligence. There must be some other element in the situation to constitute negligence. Ib.

Under circumstances stated in preceding paragraph, the question whether the whistle was blown within the prescribed distance from the crossing in question can not be proved by mere opinions of witnesses, that it was blown for one crossing or the other; such fact must be proved by showing that the train was within the limits and the whistle was or was not blown. Ib.

The engineer of a railroad train is required to use ordinary care to ascertain if a person at a public crossing is in danger; and by the exercise of that care to save him if he can, but it is also the duty of a person at the crossing to exercise ordinary care on his part to avoid injury when he finds himself in a critical place or can ascertain by the exercise of ordinary care that he is in imminent danger. The two propositions form the complement of the law on the subject. Ib.

A man has the right to rely upon performance of duties which the law imposes upon a railroad company at crossings, whenever it is not

Railroads — Receivers.

RAILROADS—Continued.

apparent, to one exercising ordinary care, that the company has not complied with its duty. But where a look would have revealed the fact, and that danger was imminent, as where, in broad daylight, at a crossing where the track was straight and the view unobstructed, and the whistle of an approaching train was blown for another crossing but could be distinctly heard and the train plainly seen from the crossing in question, a person injured under these circumstances cannot recover.

Ib.

The statute makes the failure to blow the whistle within the prescribed distance from a public crossing a ground of recovery, but where, within the statutory distance from a crossing there is another crossing, so that necessarily, in order to comply with the law, the minimum distance at which the whistle could be blown for the crossing in question would be beyond the other crossing, this fact puts the plaintiff upon proof that a whistle blown beyond the first crossing was not blown within the statutory distance from the crossing in question.

Ib.

REAL PROPERTY—

In cities of the second grade of the second class, the board of water-works trustees is the creature of council, and no act done by such trustees can create an estoppel against the city (Dayton), under any claim the city may make as to the title of real estate. Dayton v. Hydraulic Co. 192

Exercising acts of ownership over unimproved land, such as hauling gravel, sand and dirt therefrom, sinking wells, and making streets on the same, shows sufficient possession on the part of one claiming to be the owner in fee of the land to maintain an action to quiet title thereto under sec. 5779, Rev. Stat. Ib.

Where the call in a deed is, "in and to the ground constituting the bed of said river," (the same being an unnavigable stream) the bed of said river is the hollow basin through which the water of the river flows at low water mark. Ib.

When the call in a deed is, "thence southwestwardly along the meanderings of the south bank of Mad river," such description carries

the northern boundary line to the south bank of Mad river, "at low water mark," when the water in the river is at its average and ordinary stage, during the entire year, without reference to the extraordinary freshets of the winter and spring or the extreme droughts of the summer or autumn.

Ib.

A board of education is liable for damages where by its acts there has been an invasion of the property rights of a private party, as where such board causes excavations to be made to a greater depth than nine feet, as provided in sec. 2676, Rev. Stat., and thereby causes injury to the foundations, walls or buildings of an adjoining property owner. Volk v. Board of Ed. 35

The right conferred by sec. 2676, Rev. Stat., of having the foundations and walls and buildings secured against damages resulting from excavations on adjoining property to a greater depth than nine feet, is in the nature of a property right; and, therefore, whoever causes injury to the foundation, walls or buildings of another, invades or takes a property right expressly given by statute.

Ib.

The indebtedness of a devisee of specific realty is not, without judgment and levy by the executor, a charge upon or set-off against the realty so specifically devised. Woodruff v. Snowden. 123

RECEIVERS—

Where a receiver was asked for on the ground that a certain contract between plaintiff and defendant had been broken by defendant in the absence of sufficient evidence showing that the contract claimed to be broken, was made, the appointment of such receiver will be denied. McCullough v. Mitchell. 704

When the receipts of property under a receivership are not sufficient to maintain the trust, it is the duty of the receiver, for his own protection, to apply to the court for instructions, instead of voluntarily continuing the trust and allowing necessary claims to accumulate. Weber v. Naltner. 96

A receiver cannot be compelled to postpone present claims, properly incurred by him, in order to meet old claims incurred under a prior receivership. Ib.

Receivers — Sales.

A receiver should not pay out money as profits arising from the receivership, without retaining a sufficient amount to meet future fixed charges and allowing for possible contingencies, such as a falling off of future receipts. Ib.

RELIGIOUS ASSOCIATIONS—

A member of such church is not responsible for its debt unless he in some way sustained or acquiesced in their creation. Males v. Murray.

373

A member of an unincorporated religious society who sues the other members on a note in which there is a clause pledging the property of the church in payment, is not entitled to a personal judgment against the defendant members nor to a decree declaring the debt a lien, but there must be a reference of the cause for an accounting and a finding as to the circumstances under which the church property was bound for the debt. Meyer v. Lipski. 95

REPLEVIN—

In replevin against a sheriff, the appearance of the defendant for the purpose of obtaining an order to sell the property pending litigation, and to make new parties, and for the purpose of giving a redelivery bond, being only steps consistent with his duty to retain possession of goods to be sold on execution, does not amount to a waiver of a jurisdictional defense. Geiser v. Heim. 729

The failure by plaintiff in replevin to set forth in the affidavit that the property is not claimed under a title acquired mediately or imediately by transfer from one from whom such property had been taken by an execution order or process, as provided by secs. 6613 and 5815, Rev. Stat., as amended, 88 O. L. 273, is a jurisdictional defect. Ib.

In the ordinary action of replevin, where the property is confessedly personal, and is susceptible of delivery, by the officer to the plaintiff on the giving of a bond, or by the officer to the defendant on the giving of a counter bond, and where all the grounds for equitable relief which the defendant has, he may set up as a defense in the replevin suit, he has an adequate remedy at law and injunction will not lie. But where the question whether the property is real or personal is in dispute, as in

case at bar, and where the property, consistingly largely of pipes buried in the ground, cannot be appraised, examined and delivered without severing the plant and cutting off the supply of gas, it ought not to be treated as personal and detached by the officer holding the writ of replevin until the right to an injunction is determined. And while the injunction prayed for in the cross-petition restraining the plaintiff from taking possession of the property may in effect include a suspension of the replevin proceedings, yet under the prayer for general relief the injunction should be made broad enough to include a stay of all proceedings in the replevin action. Ib.

While it would have been proper for the city solicitor, under the facts stated, to have included in his action in behalf of taxpayers the whole plant and to have asked for an injunction against the prosecution of a replevin suit brought by the purchasers to recover the outside portion of the plant until the validity of the sale should be determined, it is also proper for the city solicitor to bring an action for injunction as to the sale of the inside portion of the plant and file a cross petition in the replevin suit, as an application under sec. 1777, Rev. Stat., and, after setting out proceedings of the council, ask for an injunction, restraining the purchaser from taking possession and that the sale be declared void. Kerlin Bros. Co. v. Toledo. 509

In replevin, in Ohio, defendant by giving a redelivery bond admits that the property taken is the property mentioned in the writ, and when obliged to return the property, under a condition of the bond, must return the identical goods taken under the writ and cannot escape liability by saying that such goods are not the goods mentioned in the writ of replevin. Stern-Bloch Co. v. Heinsheimer. 724

SALES—

The mere fact of a sale of chattel property on installments is not sufficient to bring such a sale within the terms of sec. 4155-2, Rev. Stat., relating to conditional sales; there must be evidence that the title is to remain in the vendor. Speyer & Co. v. Baker, 59 Ohio St., 11, distinguished. Cavanaugh v. Bloom. 222

See LIMITATION OF ACTIONS.

Schools — Statutes.

SCHOOLS—

The word "may" means "must" or "shall" only in cases where public interests or rights are concerned, or where the public or third persons have a claim *de jure*, that the power shall be exercised, or where something is directed to be done for the sake of justice or the public good. Board of Ed. v. Board of Ed.

459

The constitutional guaranty of "an efficient system of common schools throughout the state" does not impose an obligation upon township boards to pay the tuition of a few pupils who elect to enjoy the advantages of a high school outside the township of their residence, either in the same or an adjoining county. Ib.

Under the Boxwell law (sec. 4029, Rev. Stat.), in which, when first introduced, it was provided that the high school tuition of certain graduates "shall be paid by the board of education of the township in which such applicant resides," and which was changed by the committee to read "may" instead of "shall," and so enacted, in which form it remained for eight years, or until 1899, when the legislature substituted the word "shall" for "may," a school board is not bound to pay tuition in a high school in an adjoining county accruing during the time when the law remained as originally enacted. During that time the word "may" did not have the force of "must" or "shall." Ib.

Where a board of education, in the exercise of this authority conferred upon it by law, has seen fit to pass a resolution prohibiting the reading of the Bible and prayer or other religious instructions in the school, its action is final and cannot be reviewed by the courts. Board of Ed. v. Pulse. 17

The management of public schools is by express statutory provisions under the exclusive control of boards of education. Each board is required to "make such rules and regulations" for the government of the schools under its control as "it may deem expedient and necessary." Ib.

Where the board has made a rule, prohibiting such religious exercises and a teacher, after due notice, refuses to obey the rule and

continues such exercises, such act of insubordination on the part of the teacher is a violation of her contract for which she may be discharged. Ib.

A person in accepting employment as a teacher in the public schools agrees to perform her labors and duties under the control and direction of the board of education and in conformity to such lawful rules and regulations as the board may adopt. Ib.

In such case a court of equity ought not to interfere by injunction to restrain the teacher from continuing the religious exercise in violation of the rule. Considerations of public policy and convenience require that the board should assume the whole responsibility in the matter, and either dismiss the teacher or rescind the rule. Ib.

SHERIFFS—

Arrangement between the sheriff and parties to the suit as to sale of property levied upon, is not invalid where no bad faith is shown. Hicks v. Grussel. 532

Possession by a sheriff's keeper constitutes possession by the sheriff. Ib.

STATUTES—

The act 93 O. L., 657, to authorize cities of the first class to issue bonds to pay for property appropriated to open, extend, widen or straighten streets, which does not appear (as it appears in 93 O. L., 657, the words "or its successors" inserted by amendment, are omitted,) in the office of the secretary of state or on the journal of either house, is void under the rule stated. Burke v. Cincinnati. 542

Where a law passed by the general assembly does not appear in the secretary of state's office, nor on the journal of either house, it must fail as a law, not from any defect in its passage, but because there is no certainty as to what the law is or was. Ib.

That which is plainly implied in the language of a statute is as much a part of it as that which is expressed. Gorham v. Steinau. 131

In so far as acts of the legislature are irreconcilable, the one signed last must prevail; but to those parts which do not antagonize each other, and are merely supple-

Statutes—Street Railways.

mental, effect must be given to the will of the legislature. State ex rel. v. Halliday, 63 Ohio St., 165, followed. State v. Lewis. 537

STREETS—

Every municipal corporation is clothed with power to protect itself, and the council has the care, supervision and control of all public highways, streets, avenues, alleys, sidewalks and public grounds, and none of these can be used for extraordinary purposes without the consent of the council. Morrow County Illum. Co. v. Mt. Gilead. 235

An ordinance passed by the council of a municipal corporation which grants a franchise to use the streets and alleys of the municipality for the purpose of supplying electric light and power to citizens, and also contains a contract for the lighting of the streets and alleys at a stipulated price, is in conflict with sec. 1694, Rev. Stat., in that it contains more than one subject and is for that reason void. Ib.

An ordinance granting a franchise to an electric light company, containing a provision, which was part of the bid for the contract, that the contract shall not be binding upon the grantees unless they are granted the exclusive use of the streets for lighting purposes, is within the rule above stated and the ordinance is invalid. Ib.

The streets of a city may be used for purposes authorized by statute in furtherance of the convenience and welfare of inhabitants and not substantially interfering with the public easement of right of travel, but when it is sought to couple with such partial appropriation a stipulation that no further use of unoccupied portions of the street shall thereafter be permitted or made for similar purposes, which is not an exercise of, but an attempt to prohibit appropriation, and when the effect is to create a monopoly, the power of a municipal corporation then to divest itself of authority conferred as a public agent must be clearly shown. Ib.

A mere delay in travel which may follow as a consequence of the lawful construction of railroad tracks in a street, is not a damage to property not directly abutting upon the street where the tracks are laid, for the reason that whatever

injury is suffered thereby is an injury suffered in common by the entire community, and even though one piece of property may suffer in a greater degree than another, nevertheless the injury is not different in kind and is therefore *damnum absque injuria*. Mitchell Furniture Co. v. Railroad Co. 218

STREET RAILWAYS—

A street car should be stopped long enough to allow a passenger thereon to alight in safety. Dussel v. Street Rd. Co. 631

An ordinance of a city making it the duty of conductors of street cars to assist passengers to alight may be considered by the jury in determining what actual assistance should have been given beyond stopping the cars for a reasonable time. Ib.

A passenger on a street car, in the absence of knowledge to the contrary, and acting in good faith, is entitled to presume that a street railway company will not be negligent in the performance of its whole duty, and will not expose such passenger to any hazard that reasonable care and prudence could fairly guard against. Ib.

The ordinance of Cincinnati, passed October 25, 1889, permitting street railroad companies to operate their electric cars at a schedule speed not exceeding ten miles an hour, is not only unreasonable, but subversive of the rights of the people in the streets, and is not a proper exercise of police power, and is, therefore, void. Lewis v. Street Ry. 53

There is no authority to justify the passing of an ordinance which could only be operative as an exercise of police power, for the purpose of meeting the demands of the public for rapid transit, and thus making the use of the public streets a constant menace to life, limb and property. Ib.

The right of the authorities of a municipal corporation to legislate on the question of speed of street cars only exists by reason of the fact that their police power is called into existence for the protection of individuals and their property, when lawfully using the streets. Ib.

The ordinance of Cincinnati passed February, 1879, limiting the speed at which street cars may be

Street Railways—Taxation.

STREET RAILWAYS—Continued.

drawn in the streets of the city to six miles an hour, applies as well to electric cars as to horse cars, although at the time such ordinance was passed no electric cars were in use; and said ordinance is now in force.

Ib.

ation or relieve the company from taxation of such assets or personal property in Ohio.

Ib.

The fact that the sworn annual reports of a mutual insurance company to the state commissioner of insurance place the assets of the company at a much higher valuation than the sum at which they were returned for taxation, the two reports being made by the same officers, who had complete and accurate sources of information, is proof that the company was aware of the true value of its assets, and indicates, *prima facie*, a purpose to evade or escape taxation; such returns, for these reasons and in view of the knowledge, as to property taxable in Ohio, required upon the part of those making returns for taxation, are so grossly careless as to be false within the meaning of the statute as defined in *Ratterman v. Ingalls*, 48 Ohio St., 468.

Ib.

The definition of money, as given sec. 2730, Rev. Stat., in the title on taxation, that it means "any surplus or undivided profits held by societies for saving or banks having no capital stock, gold and silver coin, bank notes of solvent banks in actual possession, and every deposit which the person owning, holding in trust or having the beneficial therein, is entitled to withdraw on demand" applies to banks as well as individuals; under secs. 2 and 3, art. 12 of the constitution, what is money if the property of an individual, for the purpose of taxation, is and must be money if the property of a bank. *Patton v. Bank*.

321

Credit balances which an Ohio bank has within its correspondent banks in other states, against which it may draw sight drafts, and the right of withdrawal is not subject to greater limitations than by the usages of business exist as to general deposits in banks carried by individuals, are within secs. 2730 and 2739, Rev. Stat., held to be money and taxable without deduction and should be returned as cash.

Ib.

The word "cash" is synonymous with the word "money" as used in sec. 2730, Rev. Stat., in which the meaning of the latter word is defined.

Ib.

Sections 2758 to 2769, Rev. Stat., are intended to operate uniformly and impose the same burden upon all banks and bankers, whether national

SURETIES—

See BONDS.

TAXATION—

A person whose returns of personal property for taxation the county auditor has reason to believe are false and against whom he is proceeding under sec. 2281-2, Rev. Stat., is not required to appear before the auditor, in response to the notice giving him an opportunity to be heard, but if such person fails to appear, the auditor may proceed in his absence to ascertain from the best evidence available the true amount of property which such party should have listed and have same entered on the duplicate for collection. *Ohio Farmers Ins. Co. v. Hard.*

469

Where an insurance company, in explanation of and to justify its returns of personal property at much less than its full value, claimed that it was the rule in the county and generally in the state to tax personal property at about sixty per cent. of its true value, the court held, that while the constitution and laws of the state require all property to be taxed at its true value in money, notice might be taken of the rule in question; and that where the return, if it were permissible to return such property at sixty per cent. of its value, would be a fair one, the court has power to remit the penalty, and permit the company to pay simple taxes on the amount of property which it failed to return. *Ib.*

An Ohio mutual insurance company, also doing business in other states, should under sec. 2744, Rev. Stat., list for taxation in Ohio not only its property within the state, but also its assets, whether in the form of notes or cash balances, in the hands of agents in other states. The fact that such company, in order to do business in other states, may be subjected to a franchise tax or a tax for permission to do business in a state, does not constitute double tax-

Taxation — Telegraph and Telephone Companies.

or state, corporate or private; and contemplate the taxation of all banks upon the basis of their capital stock, surplus and undivided profits. But there is no constitutional requirement that property employed by bankers, of different classes, should be taxed by a uniform rule, except that each must conform to the same standard and that standard is, "the burden of taxation imposed upon the property of individuals." Ib.

To the extent that sec. 2759, Rev. Stat., relating to banks, permits cash and cash items in possession to be included in the aggregate, from which deductions of debts are to be made, it is repugnant to the constitution and void. Ib.

The legislature, by a definition of the constitutional phrase, "property employed in banking" cannot change the meaning thereof or by such means equalize the burdens of taxation upon banks and individuals. Ib.

While greenbacks are not government bonds, in the popular or proper sense, they were still non-taxable securities of the United States and banks were, prior to August 13, 1894, entitled to exclude them from the monthly average of cash returned for taxation. Subsequent to that date, by act of congress, their privilege of exemption was taken away, and they should now be returned with the average amount of cash for taxation. Ib.

The provisions of the federal constitution prohibiting laws impairing the obligations of contracts does not operate to deprive congress of the power to withdraw the quality of exemption from taxation from greenbacks. The act of August 13, 1894, for such purpose, relates to such notes only as are "payable on demand and circulating or intended to circulate as currency; and as long as the holder can on demand obtain the money promised in the note, the government fully keeps the contract." Ib.

A failure by a bank to return balances in the hands of other banks as "cash," as required by the force of the definition of "money" in sec. 2730, Rev. Stat., above referred to, and, without intent to deceive, following an established custom among banks, returning same as "bills receivable," which would be correct but for the statutory definition re-

ferred to, does not constitute a false return within the meaning of the word "false" as defined in Ratterman v. Ingalls, 48 Ohio St., 468; such returns are incorrect. Ib.

Although the court is of the opinion that a reasonable construction of secs. 2781 and 2782, Rev. Stat., would not limit the investigation to the current year in case of merely incorrect returns and extend it to a period of five years in case of false returns, it is so held, on the authority of Ratterman v. Ingalls, 48 Ohio St., 468, and Probasco v. Raine, 50 Ohio St., 378. Ib.

Culpable negligence, in making returns of property for taxation, though there be no design to mislead and deceive, is sufficient to make a return "false." Ib.

The conditions of falsity which authorize the auditor to go back of the current year being found to exist, he may inquire into all matters touching the correctness of the returns and bring upon the duplicate all the taxes which the party making the return justly owed for that year, adding a penalty of fifty per cent. upon such items only as are found to have been falsely omitted Ib.

Where the president of a bank, being required to exercise diligence in matters relating to taxation, and having failed to return greenbacks for taxation, admitted that some rumor of the repeal of the law granting immunity from state taxation to greenbacks had reached him, the fact that he wrote to the representative from his district in the state legislature as to whether the general assembly of Ohio had repealed a law of congress, is not diligence in acquiring knowledge from sources where information is obtainable, which will relieve such president from the imputation of culpable negligence or a false return. Ib.

TELEGRAPH AND TELEPHONE COMPANIES—

The construction and maintenance of a telegraph or telephone line upon a highway is a new and additional burden upon the fee, to which, when the highway was established, it was not contemplated it would be subjected, and for which the owner is entitled to additional compensation. Denner v. Telephone Co. 273

Telegraph and Telephone Companies—Trusts.

TELEGRAPH, ETC.—Continued.

When a telegraph or telephone company proceeds to construct its line and erect poles upon the highway during the pendency of an action to enjoin them from so doing against the objection of the owner and without first acquiring the right to do so by contract with the owner or otherwise, a court of equity will order the same removed. Ib.

Injunction is the proper remedy for the abutting owner on a highway or against a telegraph or telephone company, which attempts to construct its line on the highway without obtaining his consent or otherwise acquiring the right to do so, and the abutting owner's right thereto is not defeated by a right of action to sue for the amount claimed as damages. Ib.

Section 3461, Rev. Stat., relating to telegraph companies, and by sec. 3471, Rev. Stat., extended to apply to telephone companies, authorizing the probate court, upon failure of the municipal corporation and the company to agree, "to direct the mode in which such lines shall be constructed along the streets, alleys or public ways, so as not to incommod the public," attempts to confer legislative functions upon probate courts and is, therefore, unconstitutional and invalid. Zanesville Tel. and Tel. Co. v. Zanesville. 134

Determining and fixing of the mode of use of streets and alleys of a municipality by a telephone company, so as not to incommod the public in the use of the same, is a legislative function or duty. Ib.

TRIAL—

In the absence of defendant's admission that he has no defense, or where there remains a scintilla of proof in his favor, the court cannot strike the answer from the files as sham or frivolous, and thus deprive the party of trial by jury on the merits. Wentzel v. Zinn. 97

TRUSTS—

In an action brought under the provisions of the Valentine-Stewart anti-trust law, for attempting to "freeze" the plaintiff out of business, the main *gravamen* of the complaint is the attempted destruction of plaintiff's business, sought to be accomplished by various means, which, by

reason of the alleged conspiracy, are properly conjoined in one action, although, if used alone, each means would constitute a single cause of action. Barron v. Plate Glass Co. 114

The averment of a conspiracy makes it possible to unite in one action, and as a single cause of action, claims for damages which would otherwise have to be sought in independent actions. Thus, threats, slander of business, unlawful solicitation of customers, etc., may be parts or elements of the charge of conspiracy or the attempted destruction of plaintiff's business. Therefore, a motion requiring plaintiff to itemize his damages should be overruled. Ib.

When two parties acquire property through an illegal business the title to which is taken in the name of one of them, the husband of such party who succeeds to such property by inheritance will be held to hold the other party's share in trust for his benefit. The fact that the property was acquired in an illegal business, is not, as between such parties, material and will not defeat an action to establish the trust. Brueger v. Molique. 731

A trustee of an express trust, or a person in whose name a contract has been made for the benefit of another, may be joined with his beneficiaries as a party plaintiff in a suit to protect the rights under such contract, although by sec. 4995, Rev. Stat., he may sue without joining his beneficiaries. Kuhn v. Woolson Spice Co. 292

The Valentine anti-trust law, 93 O. L., 143, providing that "a combination of capital, skill or acts by two or more persons, firms, partnerships, corporations, or associations of persons, or any two or more of them, to create or carry out restrictions in trade or commerce, are illegal;" and that "violation of either or all of the provisions of this act shall be and is hereby declared a conspiracy against trade," is not unconstitutional or invalid. State v. Jacobs. 252

The law in question declares that "any combination of capital, skill, or acts by two or more persons, firms, partnerships, corporations or associations of persons, or of any two or more of them, for either any or all of the following purposes, shall constitute a trust." The first purpose

Trusts — Wills.

named is to "create or carry on restrictions in trade or commerce." Therefore, any combination or confederation among two or more persons in restraint of trade or commerce comes within the express letter of this act.

Ib.

A combination by two or more persons for the purpose of boycotting a third person is a violation of the provisions of said act and is a conspiracy against trade within said act.

Ib.

In a prosecution for boycotting under this act it is sufficient to prove that a combination as defined therein existed and that the defendant belonged to or acted for or in connection with it, without proving all the members belonging to it, or proving or producing any article of agreement or any written instrument on which it may have been based, or that it was evidenced by any written instrument at all. The character of the combination alleged may be established by proof of its general reputation as such.

Ib.

Where several persons are proved to have combined together for the same illegal purpose, any act done by one of them in pursuance of the original concerted plan and with reference to the common object, is, in the contemplation of the law, the act of the whole party, and therefore proof of such act is competent evidence against any of those who were engaged in the conspiracy; and any declaration made by one of the parties during the pendency of the illegal enterprise, is evidence against himself and all the other conspirators, who, when the combination is proved, are as much responsible for such declaration and the acts to which it relates as if made and committed by themselves. This rule applies to the declaration of a co-conspirator, although he may not himself be under prosecution.

Ib.

See also WILLS.

UNION DEPOT COMPANIES—

A Union Depot Company has the right to give to a transfer company the exclusive use of depot grounds, for standing its vehicles and soliciting customers thereon, and to exclude therefrom all others engaged in a like business, excepting only for the purpose of delivering passengers or of calling for persons who have previously engaged them, notwithstanding the provisions of the anti-trust law. (Adopted as law laid down in *Snyder v. Union Depot Co.*, 10 C. D., 000.) *State v. Brown.* 28

VERDICTS—

Admissions made by pleadings, proof taken by deposition, and the admission of the execution of the contract, are sufficient to cure a defect in the verdict caused by the failure of the jury to find that plaintiff was a corporation. *Grand Rapids Furniture Co. v. Robinson.*

93

WILLS—

A will bequeathing testator's estate to her husband and providing that "should any child or children (we have now only one, George Gabriel) be born to me hereafter, it shall in no wise change, alter or revoke this will and testament" is contrary to sec. 5961, Rev. Stat., and while sec. 5959, Rev. Stat., controls as to the child mentioned in the will and he takes nothing, a child born after the execution of the will takes the same share he would have taken had his mother died intestate. The provision of sec. 5959, Rev. Stat., relating to where a party has no children and executes his will and makes plain his intention to disinherit after-born children, cannot be read into sec. 5961, Rev. Stat., or allowed to defeat the claim of such after-born child. *German Mut. Ins. Co. v. Lushey.*

24

Section 5959, Rev. Stat., does not expressly, or by implication, repeal sec. 5691, Rev. Stat. The two sections should be construed separately as each was enacted to cover a particular case and neither is in conflict with the other.

Ib.

Where, by the terms of a will, it is plainly shown to be the intention of the testator to bar his widow of the first year's support, and provision is made for her in lieu thereof, if she elects to take under the will, she is not entitled to such allowance. *Witner, In re Est. of.*

80

The rule in Shelley's case as applied to wills was abrogated by statute in Ohio, in 1840, cannot, therefore, be appealed to assist in ascertaining the intention of the testator in the construction of a will. *Kiersted v. Smith.*

279

Unless some positive rule of law or enactments of statutes should require it, a will should be construed

Wills.

WILLS—Continued.

so as to follow former constructions by courts and interested parties in the administration of the estate.

Ib.

Heirs presumptive or apparent who have not a vested estate in trust property have a right to object to the termination of a trust created by a will, which will cut them out of the rights accruing to them should the trust be continued according to the terms of the will.

Ib.

A trust created by a will in property cannot be terminated with the consent of the beneficiaries, if such termination will destroy the rights other parties would eventually have in the trust property, should the trust be continued under the terms of the will.

Ib.

In the construction of a will, the rules that "the intention of the testator must control;" "words should be used in their ordinary and usual signification;" "the whole will should be construed as a whole;" "equitable words should be given their technical meaning;" "the law favors the vesting of estates;" are subject to the application of the broader rule that the clear meaning of the will, showing the clear intent of the testator must not be negatived or set aside.

Ib.

The rule that such a construction will be favored as will contribute to the immediate vesting of an estate will not be applied so as to defeat the intention of the testator.

Ib.

A will devising property to a trustee to be held in trust for the benefit of testator's two daughters, to be "set off" to them or either of them by the trustees on their arrival at age, but to be still held in trust to their arrival at age, "and said partition between them," the rents and profits only to be paid to them or either of them, according to their respective shares, during their lives, with the fee simple to the heirs of said daughters "to be divided equally as above," gives to the daughter a life estate only and not a fee simple.

Ib.

Where a will provided that the residue of testator's estate should be held in trust for his daughters, to be "set off" to them by trustees on their arrival at age, but to be still held in trust after their arrival at age and "partition" between them, the words "set off" and "partition,"

as against the provisions referred to in a preceding paragraph, are not to be construed to mean a division of a fee simple or inheritable estate.

Ib.

Section 5970, Rev. Stat., providing that every devise of lands, etc., in any will hereafter made, shall be construed to convey all the estate of the devisor therein which he could lawfully devise, unless it shall clearly appear by the will that the devisor intended to convey a less estate, does not necessarily mean that the whole estate must be devised to the first taken, unless the intention of the testator is clearly shown, nor does it require each item of the will to show the testator's intention, if the intention as to the several items can be devised from the whole will.

Ib.

Where the language of a will clearly indicates the intention of the testator to give a life estate to his daughters, and the fee simple in remainder to their heirs, such intention cannot be defeated by a construction as to the sense in which the word "heir" is used. The expressed intent of the testator, not the mere implication should fix the meaning of the word "heir."

Ib.

Where, by the provisions of a will certain sums are set aside and invested and the proceeds are to be paid to certain persons during their lives, such persons are legatees and not annuitants. *Krigbaum v. Irvin.*

226

Where an executor in carrying out the provisions of a will sets aside and invests certain sums, the income of which is to be paid to a certain person during her lifetime, he ceases to act as executor and as to that property becomes a trustee.

Ib.

Where a testator makes the same provision in his will for his widow that she would be entitled to by the terms of an ante-nuptial contract, and stipulates that it shall be in lieu of dower and in lieu of her rights under the ante-nuptial contract, the widow by electing to take under the will waives her right to dower and her rights under the ante-nuptial contract, and cannot afterwards claim either.

Ib.

Where a testatrix residing in West Virginia made a will and continued a resident of that state until her death, the original probating of her will in Ohio is void and passes

Wills — Wrongful Death.

no property right to legatees claiming under such will. *Fleming v. Hoffman.* 560

The will of a resident of another state does not operate to pass title to property in Ohio by being admitted to probate in this state until duly probated in the state where testatrix was a resident at the time of her death. *Ib.*

An explanatory clause in a will containing clear and distinct words of perpetuity will control doubtful language used in another clause, especially if the latter attempts to create entailments or limitations. *Helming v. Meyer.* 308

WITNESSES—

The question of the constitutionality of a statute requiring witnesses to appear and answer questions, cannot be raised by one who is not a formal party to a case, criminal in its nature, when it appears that, in his own opinion, the answer would not tend to criminate him. *Steuer v. McCounell.* 573

The legislature of Ohio has constitutional power to vest a city council, or a committee thereof, with authority to commit to jail a witness who may refuse, except under the privilege as to incriminating testimony, to answer pertinent questions put in the course of an investigation which is confined within the proper limits of its lawful functions; and so far as an investigation is confined to finding out whether or not corrupt methods have been used, or attempted to be used, in procuring a public contract, it is legitimate. *Ib.*

While sec. 1545-11, Rev. Stat., known as the federal plan law of Cleveland, which authorizes the

council, or any committee thereof, to compel the attendance of witnesses, and provides that no witness shall be excused from testifying, but that the testimony shall not be used in criminal prosecution, except for perjury, gives no power to a committee of the council, to commit for contempt, it does not in terms, or by implication, repeal or prevent the operation, as conflicting or inconsistent, of sec. 1687, Rev. Stat., which provides that in all cases in which attendance of witnesses may be compelled, etc., the council or a committee thereof, shall have the power to compel the giving of testimony conferred upon courts of justice. *Ib.*

WRONGFUL DEATH—

Where, in an action for wrongful death, caused by failure of a railroad company to fill or block a guard rail, as required by statute, it appears that plaintiff's decedent had worked about the place, as a brakeman, for ten years; that the unblocked rail was an obvious condition; that he had had abundant opportunity to observe that the rail was unblocked; that he made no complaint; in such case decedent must be held to have assumed the danger and cannot recover on the ground of the failure of the company to block the guard rail. *Johns v. Railway Co.* 348

The words "personal representatives" as used in secs. 6134 and 6135, Rev. Stat., relating to actions for wrongful death, mean executors and administrators. Therefore an action under the statute in question may be brought by the executor of the person so deceased. *Wittman's Extr. v. Railroad Co.* 563

Ex. No. 1

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